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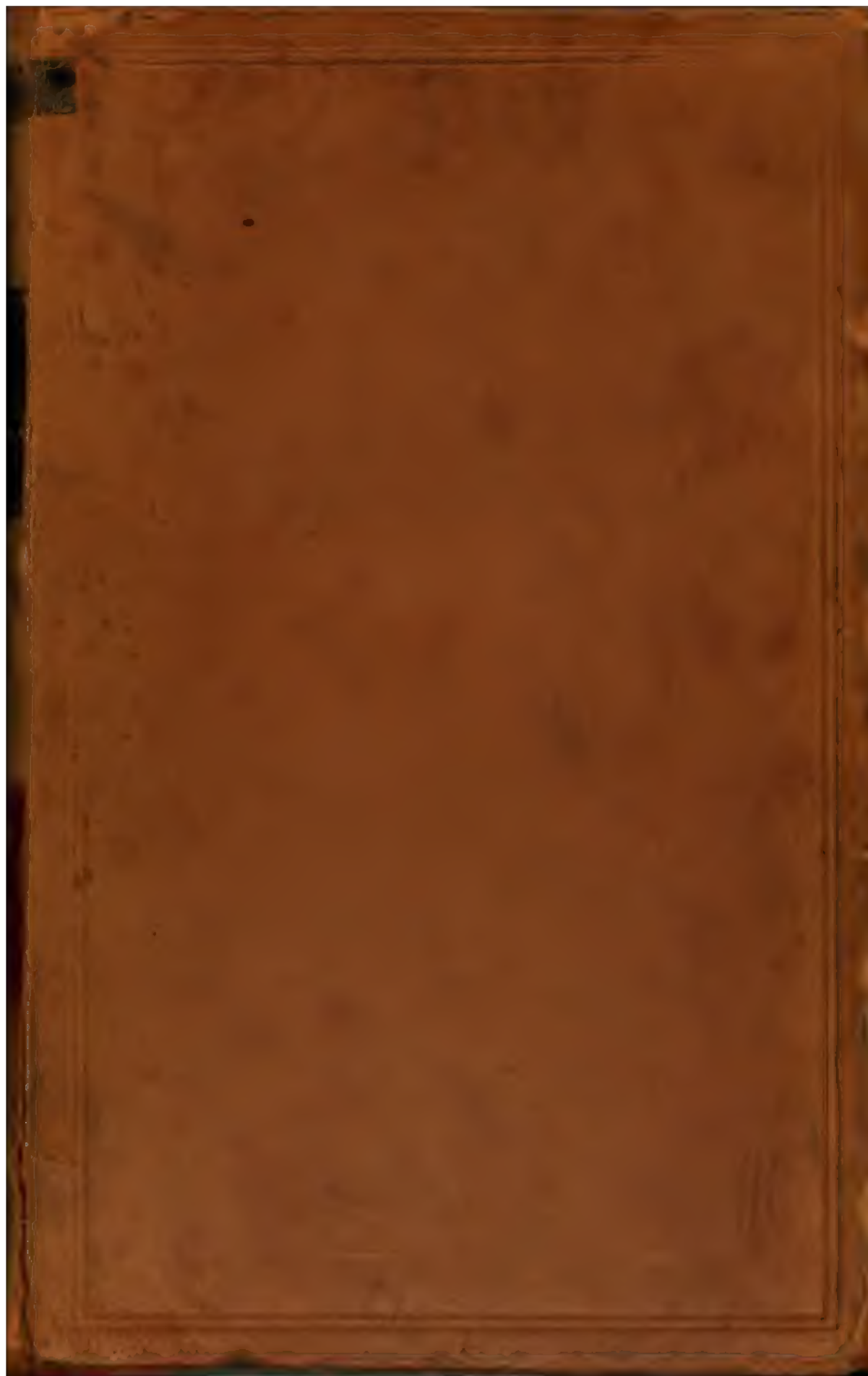
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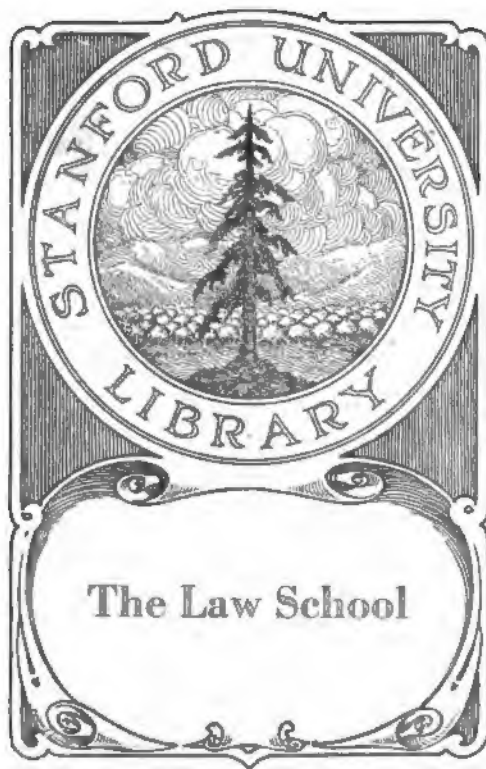
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AMERICAN
RAILROAD AND CORPORATION
REPORTS.

**BEING A COLLECTION OF THE CURRENT DECISIONS OF THE
COURTS OF LAST RESORT IN THE UNITED STATES PER-
TAINING TO THE LAW OF RAILROADS, PRIVATE AND
MUNICIPAL CORPORATIONS, INCLUDING THE
LAW OF INSURANCE, BANKING, CARRIERS,
TELEGRAPH AND TELEPHONE COM-
PANIES, BUILDING AND LOAN
ASSOCIATIONS, ETC., ETC.**

EDITED AND ANNOTATED BY
JOHN LEWIS,

AUTHOR OF "A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES."

VOLUME IX.

CHICAGO :
E. B. MYERS AND COMPANY,
LAW PUBLISHERS.
1894.

Entered, according to act of Congress, in the year eighteen hundred and ninety-four,

By JOHN LEWIS,

In the office of the Librarian of Congress, at Washington.

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THE EDITOR.

CHICAGO, *October*, 1894.

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AMERICAN RAILROAD AND CORPORATION REPORTS.

NORTH AND SOUTH ROLLING STOCK CO. v. PEOPLE EX REL.
SCHAEFER, STATE'S ATTORNEY.

(Supreme Court of Illinois, October 27, 1893.)

1. CORPORATIONS. QUO WARRANTO. ADMISSION OF CORPORATE EXISTENCE. Filing an information in quo warranto against a corporation by its corporate name is an admission that it has been legally incorporated.

2. FORFEITURE OF CHARTER. EFFECT OF OFFICERS AND STOCKHOLDERS BEING NON-RESIDENTS. Residents of Missouri organized a corporation under the laws of Illinois. Its property was in Illinois and part of its business was transacted there. It had an office in Illinois, where all official meetings of the stockholders and directors were held. It also had an office in Missouri, where part of its business was transacted. All its officers, directors and stockholders had always been residents of the latter state. Held, there was nothing in these facts which constituted a ground for forfeiture of its charter.

3. FAILURE TO KEEP ITS BOOKS IN THE STATE IN VIOLATION OF STATUTE. A technical violation by a corporation of the Revised Statutes, chapter 82, section 13, which requires the directors "to cause to be kept at its principal office or place of business in this state correct books of account of all its business," is not cause for forfeiture of corporate franchises, where the books are kept just across the state line from the corporation's Illinois office, and are brought to that office whenever demanded by any stockholder, or other person entitled to inspect them, since a substantial compliance with the statute is sufficient.

4. OTHER GROUNDS OF FORFEITURE. The facts that a corporation has no sign at its office, and that it has not had its property listed for taxation, are not grounds for forfeiting its charter. Nor are they material as giving color or significance to the other facts considered.

THIS was an information in the nature of a quo warranto brought by the people of the state of Illinois, on the relation of the state's attorney of St. Clair county, in the City Court of

East St. Louis, against the North and South Rolling Stock Company. A petition for leave to file the information having been granted, an information was filed, the substantial portions of which are as follows: "M. W. Schaefer, state's attorney in and for said county, who sues for the people of the state of Illinois in this behalf, comes into court on this day, and for the said people, and in the name and by the authority thereof, gives the court here to understand and be informed that the North and South Rolling Stock Company, for the space of two years last past, and more, in the county and city aforesaid, has used, and still does use, without any warrant, charter or grant, the following liberties, privileges and franchises, to wit, of owning, buying and leasing, selling and operating, railroad rolling stock, all of which said liberties, privileges and franchises the said company, during all the time aforesaid, upon the said people, has usurped and still doth usurp, in the county and city aforesaid, to the damage and prejudice of the people, and against the peace and dignity of the same. Whereupon the said state's attorney, for the said people, and in the name and by the authority thereof, prays the consideration of the court here in the premises, and due process of law in this behalf, to make said North and South Rolling Stock Company answer to the said people by what warrant it claims to have, use and employ the liberties, privileges and franchises aforesaid." To this information the defendant filed the following plea: "And now, on this day, comes the said North and South Rolling Stock Company, by L. H. Hite, its attorney, and, having heard read the said information, for plea in this behalf, says it is a duly organized and chartered company, incorporated under the laws of the state of Illinois, with license and charter duly issued by the secretary of state of said state, authorizing it to carry on the business of owning, leasing, buying, selling and operating railroad rolling stock, said corporation being organized under and by virtue of sections 1 to 28, inclusive, of an act entitled 'An act concerning corporations,' passed by the legislature of Illinois, approved by the governor, and in force July 1, 1872. And by this warrant the said North and South Rolling Stock Company has used, during all the time mentioned in said information, and still uses, the said liberties, privileges and franchises of owning, leasing, buying and selling and operating railroad roll-

ing stock, as the said North and South Rolling Stock Company well might and still may; without this, that said North and South Rolling Stock Company has usurped, or does now usurp, the liberties, privileges and franchises aforesaid, or any or either of them, upon the said people, as by the said information is above supposed. All which matters the said North and South Rolling Stock Company is ready to verify," etc. "Wherefore, it prays judgment," etc.

To this plea the state's attorney filed two replications, as follows: "And the said people of the state of Illinois say that the plaintiff ought not to be barred from maintaining the said information by reason of anything alleged in said plea, because the defendant has not kept, or caused to be kept, at its principal office or place of business in this state, correct books of account of all its business, as required by the statute in such case made and provided, whereby the defendant has forfeited its franchises aforesaid. And this the plaintiff is ready to verify. And, for a further replication to said plea, the plaintiff says that all the stockholders, directors and officers of the defendant are now, and always have been, non-residents of this State; that the defendant does not now and never has kept an office or place of business in this state, but has hitherto and does now keep its office and place of business in the city of St. Louis, state of Missouri, at which the business of defendant is transacted; that the franchise of the defendant was procured for the purpose of being exercised outside of this state, in the manner aforesaid, and without any intention of making the defendant a domestic corporation, in fact and substance, and that, in truth, the defendant has, since its organization, acted, for all practical purposes, as a foreign institution, and has maintained in this state a mere nominal existence. And this the plaintiff is ready to verify."

The following rejoinder was thereupon filed by the defendant to the second or additional replication, but by order of the court, entered by agreement of the parties, it was subsequently extended so as to apply to both replications: "And the said defendant, as to the additional replication of the People's," etc., "filed herein November 2, 1891, says that said plaintiff ought not, by reason of anything by them in that replication alleged, to be barred to have or maintain their aforesaid action against it, the said defendant,

because it says that ever since the granting of its said charter and since its organization, up to the present time, it had kept an office in the city of East St. Louis, in the state of Illinois, where its elections and stockholders' meetings and meetings of its board of directors are regularly held, and where all its records and books of accounts and papers have been and are produced for the inspection of any stockholder or his attorney, or other person interested, whenever requested by such person, and that the said charter and its privileges were sought and procured for the purpose of being exercised in the state of Illinois, and since its organization all its dealings in the matter of handling and running its rolling stock have been in the hands of, and with, the St. Louis, Alton and Terre Haute Railroad Company, an Illinois corporation, and that the situs of defendant's only property, its cars and rolling stock, has actually, all the time, been, and now is, in the state of Illinois; that no stockholder or other person interested, has ever sought to obtain any information, or to do any legitimate business, at defendant's said East St. Louis office, and been denied the privilege or right to do so. And this said defendant is ready to verify. Wherefore, it prays judgment if said plaintiff ought to have or maintain the aforesaid action thereof against said defendant."

This rejoinder was traversed, and issue taken thereon to the country. The cause was then tried by the court, a jury being waived by stipulation of the parties; and at such trial the court found the issues in favor of the people, and rendered judgment ousting the defendant from the franchises in question, and precluding it from exercising the same under any right or claim whatever, and the defendant was also adjudged to pay the costs of the prosecution. From that judgment the defendant has now appealed to this court.

At the trial, the defendant, to maintain the issues on its part, read in evidence an agreement between Henry O'Hara, J. S. Berthold and C. M. Jennings, dated December 1, 1887, and by which, after reciting that O'Hara and the firm of Berthold & Jennings were the owners of certain railroad freight cars, and were desirous of putting the same under one management and virtual ownership, for the purpose of avoiding conflicting interests, and for the better management of the property, it was agreed

by them to form and incorporate themselves into a joint stock company, under the laws of the state of Illinois, by the name and style of North and South Rolling Stock Company, for the purpose of owning, leasing and operating railroad rolling stock, and buying and selling the same, and for any other purpose for which like companies are formed. And it was further agreed that the individuals named should subscribe equally to the capital stock of the proposed corporation — the amount of capital stock, the number of shares, and the par value of the shares to be agreed upon before making application for incorporation ; that the affairs and business of the company should be conducted and managed by a board of directors consisting of the stockholders, who, for the first twelve months, and until their successors were elected, should be the three parties to the agreement ; that the officers of the corporation should be a president, vice-president and manager, and secretary and treasurer, who should comprise the board of directors, as above stated ; that O'Hara and Berthold & Jennings should lease to the proposed corporation the railroad freight cars owned by them, respectively, and then running on the St. Louis, Alton and Terre Haute railroad (Belleville and Southern Illinois division) and connections, for the term of fifteen years, with the privilege of purchase to be specified in the lease ; that O'Hara should lease to the corporation 75 stock cars and 200 box cars, described as bearing certain numbers, and marked "St. Louis & Cairo Short Line Railroad ;" that Berthold & Jennings should lease to the corporation 100 refrigerator cars and 156 box cars and 58 coal cars, all bearing certain numbers, and being marked same as above. And it was agreed that the parties would not be interested in any manner in any other rolling stock running on the St. Louis, Alton and Terre Haute railroad and connections, other than through the proposed corporation, during its existence. The defendant also read in evidence its certificate of incorporation and accompanying documents, whereby it was incorporated under the provisions of the act of the general assembly of this state entitled "An act concerning corporations," approved April 18, 1872. Those documents consisted first, of a statement signed and acknowledged by O'Hara and Berthold & Jennings, for the purpose of forming a corporation under that act, by the name above stated, in which it was declared that the object

for which the corporation was formed was that of "owning, leasing, buying, selling and operating railroad rolling stock;" that the capital stock of the corporation was to be \$300,000, to be divided into 3,000 shares of \$100 each; that the principal office of the corporation would be at East St. Louis, St. Clair county, Ill., and the duration of the corporation fifty years. Also, the report of the commissioners appointed to open books of subscription to the capital stock of the proposed corporation, showing the full amount of the capital stock had been subscribed, and that the above-named parties had each subscribed for 1,000 shares. Also, the final certificate of incorporation by the secretary of state, showing a compliance with the statute, and declaring the North and South Rolling Stock Company a legally organized corporation under the laws of this state. It was also shown that the certificate of incorporation was duly recorded in the office of the recorder of St. Clair county, February 17, 1888. The defendant also read in evidence an instrument dated February 1, 1888, by which O'Hara leased to the corporation 76 stock cars and 200 box cars, having the numbers and marks above stated, with an agreement to sell his interest in them to the corporation at any time within ten years, at its election; and it was agreed that all of the rolling stock should remain on the line of the St. Louis, Alton and Terre Haute railroad and its connections, and retain their respective marks and numbers.

Berthold was then called as a witness, and his testimony was, in substance, as follows: "I am acquainted with the defendant corporation. O'Hara, Jennings and I organized it. We three were the stockholders. At that time we lived at St. Louis, Mo. The corporation has an office in East St. Louis. It is in the office of T. L. Fekete. We pay him rent. Our meetings are held at the office in East St. Louis. We have never held stockholders' or directors' meetings elsewhere. The property of the company consists of railroad rolling stock. The agreement was that the property should be placed, where it has ever since remained, in the hands of the Cairo Short Line Railroad Company. That is an Illinois corporation. We have our local office for the purpose of daily business in St. Louis. It is at the office of Berthold & Jennings, southeast corner of Fourth and Chestnut streets. That office has been there ever since the organization of the company,

and ever since the principal office was located at East St. Louis. There was never a request by any person to examine the books of account and papers at the principal office in East St. Louis but once. O'Hara made the demand, and they were produced and examined by him. They were free to all stockholders in St. Louis at any time. He was a St. Louis stockholder, and had his office right across the street from our St. Louis office and knew where the books were. After the first election, O'Hara, Jennings and I continued to be directors. I was president of the board; O'Hara, vice-president; and Jennings, secretary and treasurer. For the last five years the officers of the corporation have visited East St. Louis, the place of the principal office, two or three times a week on an average. On an average the president or vice-president or some officer of the corporation has been in East St. Louis on an average of two or three times a week on business of the company." On cross-examination he said: "At the time the corporation was organized, the persons organizing it, and who became stockholders and officers, were non-residents. These persons all remained non-residents and are still stockholders. The company never has had a stockholder or officer who was a resident of the state of Illinois. The capital stock is \$300,000, all paid up. At the time of the organization each stockholder took \$100,000 of stock. The corporation was organized for the purpose of leasing, buying, selling and operating cars and locomotives. At that time the individual corporators had a lot of rolling stock. All the rolling stock was turned over by us, and that was considered as paying for the stock. At that time the headquarters of the rolling stock was in East St. Louis, but the stock itself may have been in Mississippi, Alabama, Texas and all over. It was not leased to any one at the time, but we put it on the roads and got mileage. After the company was organized it remained with the St. Louis, Alton and Terre Haute Railroad Company, we collecting the mileage. The only property of the corporation that I know of was the rolling stock on the Short Line. We have acquired cars since, but all we have is on that line. I do not know that we ever listed the property for taxation in the state of Illinois. I have been president, and Jennings has been secretary and treasurer of the company all the time. O'Hara has been vice-president part of the time. The present

stockholders are O'Hara, Jennings, George S. Hoke and myself. O'Hara has 1,000 shares; Jennings, 999; Hoke, 1, and I, 1,000. The only business transacted by the company has been with reference to the use of the cars and the collection of the mileage. We have books of account and corporation records showing stockholders' and directors' meetings. We have a regular set of books. Any one can find our office at St. Louis by getting our address and going to it. There is no sign to show where the office is. We three gentlemen, who organized the company, have had other business. Jennings and I had a lumber yard. When we come to Illinois it is to see to those cars. I have not been in East St. Louis on private business of my own for four years. I have come to see about those cars. We have clerks who look after the lumber business. Have no yard now. We have an office in Fekete's office, and pay him ten dollars a year rent. We have no furniture or other property of the corporation there. The corporation books are not kept there regularly. The only time when the stockholders visit the East St. Louis office is at the directors' meetings. We never did business there, and never had occasion to. We talked over what had been done. That was at a stockholders' meeting. Those meetings were held once a year; it may be oftener. Anybody interested could find our office in East St. Louis. I do not think the public would need to know where to find it. Our charter calls for a principal office in East St. Louis. We had no sign up there. I go to Fekete's office pretty often. The company never undertook to keep its books there. I do not know that the company ever paid any taxes in Illinois. It does not show on our books that we ever paid taxes there. I do not know what the Cairo Short Line did. As president, in my visits of two or three times a week, I have been at Fekete's office, where our principal office is, much oftener than once a year. I never heard of any inquiry being made at that office, or in St. Louis, as to the whereabouts of the corporation. There has been no inquiry made in relation to our property, or otherwise, so far as I know. We never owned any roadbed or right of way, nor assumed to run a railroad."

The foregoing was all the evidence offered, and upon that evidence the court found the issues for the relator, and rendered judgment of ouster.

L. H. Hite, for appellant. *M. W. Schaefer*, *State's Atty.*, and *M. Millard*, for appellee.

BAILEY, J. (*after stating the facts*). To determine the propriety of the finding and judgment of the court in this case, it is important, in the first place, to notice the precise nature of the issues which were submitted for trial. The information was filed by the state's attorney against the North and South Rolling Stock Company, by that name, requiring it to answer by what warrant it claimed to have, use and exercise the liberties, franchises and privileges of owning, buying, leasing, selling and operating railroad stock. The defendant answered by setting up its incorporation under the general law of this state in relation to corporations, the purposes for which it was incorporated, as declared in its certificate of incorporation, being to use and exercise the precise franchises and privileges mentioned in the information. The relator, by proceeding against the defendant by its corporate name, must be deemed to have admitted the fact of its incorporation. The weight of authority may now be regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name, to procure the forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchises, is to admit the existence of the corporation. When, therefore, the information is filed against the defendant in its corporate name, and process is issued and served accordingly, and the defendant appears and pleads in the same corporate character, its corporate existence cannot afterwards be controverted. High. Extr. Leg. Rem. § 661.

It will thus be seen that the legality of the defendant's incorporation is not assailed, but the relator seeks to bring the case within that clause of the statute in relation to quo warranto which authorizes the filing of an information where "any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation." For the purpose of showing such acts of omission or commission, the relator has filed two replications. The first alleges that the defendant has not kept, or caused to be kept, at its principal office or place of business in this state, correct books of account of all its business,

as required by statute. The second replication alleges that all the stockholders and officers of the defendant are now, and always have been, non-residents of this state; that the defendant does not now, and never has, kept an office or place of business in this state, but has hitherto and does now keep its office and place of business at St. Louis, Mo., at which its business is transacted; that the franchise of the defendant was procured for the purpose of being exercised outside of this state, in the manner aforesaid, and without any intention of making the defendant a domestic corporation, in fact and in substance, and that the defendant has, since its organization, acted, for all practical purposes, as a foreign institution, and has maintained in this state a mere nominal existence. The rejoinder constitutes a substantial traverse of these allegations, and upon the issues thus formed the case was tried. No question being made by the respondent as to the propriety of these replications, or as to whether they do not constitute clear departures from the case made by the information, we are disposed to treat the issues as properly joined. But it may be observed that, as to all the matters thus submitted for trial, the burden of proof was on the relator, and unless he has proved, by a preponderance of the evidence, that the defendant has committed or omitted acts which amount to a surrender or forfeiture of its rights and privileges as a corporation, the judgment of ouster cannot be sustained. No evidence was introduced and no witness was called on behalf of the relator, the cause being submitted upon the documentary evidence introduced by the defendant, and upon the testimony of Berthold, one of the defendant's stockholders and directors, and its president, and who was called as a witness by the defendant.

From the evidence thus introduced, it appears that on the 1st day of December, 1887, the firm of Berthold & Jennings, who were then, and still are, residents of, and doing business in, St. Louis, Mo., were the owners of a large number of railroad freight cars, which were then leased to the St. Louis, Alton and Terre Haute Railroad Company, a corporation organized under the laws of this state, and were then in use by that company on its Belleville and Southern Illinois division, commonly known as the St. Louis and Cairo Short Line — a line of railroad situated in this state; that Henry O'Hara, who also was then, and still is, a resident of,

and doing business in, St. Louis, was, in like manner, the owner of a large number of other railroad freight cars, which were leased to the same Illinois corporation, and in use on the same line of railroad in this state ; that for the purpose of placing these cars under one management, and avoiding conflicting interests, and for the better management of the property, these parties agreed to incorporate themselves into a joint-stock company, under the laws of this state, by the name and style of the North and South Rolling Stock Company ; that the three parties should subscribe equally to the capital stock of the proposed corporation, and should constitute its first board of directors and officers ; that they should turn over the cars owned by them, respectively, to the corporation, on certain prescribed terms, and should not be interested in any manner except through the proposed corporation, in any other rolling stock running on the St. Louis, Alton and Terre Haute railroad or its connections. In pursuance of this agreement the corporation was organized, its entire property and assets consisting of these cars, and other cars subsequently purchased, and all leased to and in the possession of an Illinois railroad corporation, and in use on a line of railroad in this state, and its entire business, so far as the evidence shows, consisting of periodical settlements with the lessee railroad company for the mileage or other rents earned by the leased cars. It will thus be seen that the property and assets of the corporation, at the time of its organization, were, and ever since that time have been, wholly within this state. To what extent its business has been actually transacted in this state is not clearly shown, but, as the burden of proof on this point is upon the relator, failure of proof militates against the case of the prosecution, rather than that of the defense. It may be said, however, that there is nothing in the evidence tending to show that the corporation had any business which required constant attention on the part of any of its officers or agents, either in this state or elsewhere. As its rolling stock has been operated by the lessee corporation, the defendant had nothing to do with that part of the business, and its settlements for mileage or rents may, so far as appears, have required attention only at fixed intervals. Where those were made, whether in Illinois or Missouri, the evidence fails to show with certainty, although, perhaps, it may be inferred from the fact that the lessee corpora-

tion was resident in Illinois, and had its principal office in East St. Louis, and the further fact that the defendant's president made frequent visits to that place on the defendant's business, that the object of those visits was, in part at least, to make settlements with the lessee.

The testimony of Berthold shows — and in this he is not contradicted — that the defendant, ever since its organization, has kept an office in East St. Louis, and that all official meetings of the stockholders and directors have been held there. He admits that no officer or agent of the corporation has been kept in constant attendance at that office, and there is nothing showing that the business of the corporation has been such as to require that to be done. He testifies, however, that he, as president of the company, has been in the constant habit of going to East St. Louis, as often as two or three times a week, to look after its business; and it may fairly be inferred from his testimony that while there he made his headquarters at the East St. Louis office. He also testified that the other officers of the corporation frequently went over to East St. Louis to look after the company's business. It appears, also, that the defendant has also an office in the city of St. Louis — that office being at the place of business of Berthold & Jennings, and across the street from the place of business of O'Hara; but the evidence leaves it very much in doubt as to how much and what portion of the corporate business was transacted at that office. It seems to have been more convenient for the three stockholders to have the books kept there, but the witness testified that they were kept part of the time at the East St. Louis office, and that they had always been there when any stockholder or other person had desired to examine them at that place. In view of all the evidence, we are of the opinion that the averments of the relator's replication, that the defendant's franchise was procured for the purpose of being exercised out of this state, and without any intention of making the defendant a domestic corporation in fact or in substance, and that since its organization it has acted, for all practical purposes, as a foreign institution, and has maintained in this state a mere nominal existence, are not proved. The property of the corporation is all located in this state, and is managed, used and controlled here. Upon its organization it established an office in this state, which it calls its prin-

cipal office, and where all meetings of the stockholders and directors have in fact been held, and that office has ever since been and is still maintained. A considerable, if not the most material, portion of its business is, and has always been, transacted and its substantial interests are, and have always been, in this state. Under these circumstances its existence here must be held to be much more than nominal. If it has forfeited its franchise it must be by reason of some other act than that of falsely and fraudulently posing as a domestic corporation, while it has, in substance and in fact, accomplished its migration to another jurisdiction.

The facts of this case are different in all their essential features from those appearing in *Land Grant Railway & Trust Co. v. Board of Com'rs of Coffey Co.*, 6 Kan. 245, and *Hill v. Beach*, 12 N. J. Eq. 31, to which we are referred. In the first of these cases a corporation had been chartered by the legislature of the state of Pennsylvania, and authorized to engage in certain business enterprises in any of the states or territories of the United States except the state of Pennsylvania. The corporation went to the state of Kansas, and there engaged in railroad building, and brought mandamus in the courts of that state to compel the county commissioners to subscribe to the capital stock of its railroad. The court, in denying its right to that writ, held that the rules of comity did not require that state to permit the corporation to do business within its borders which it was forbidden to do in the state of its creation, and that, where a corporation attempts to migrate in a body to another state, it dissolves into its original elements, and that the persons who comprise it become only individuals. So, in *Hill v. Beach*, a corporation was organized under the laws of New York to carry on the business of quarrying stone in a quarry in New Jersey, and it was held that the company would not be recognized in the courts of New Jersey as a legally constituted corporation, and that persons doing business in that state under such assumed corporate capacity would be treated as, and held to the responsibility of, partners. None of the elements forming the *ratio decidendi* in those cases are present here.

In this case, however, it is proved (1) that the stockholders, directors and officers of the corporation are non-residents of this

state; and (2) that the corporation has failed to keep its corporate books continuously at its principal office in this state, and it remains to be seen whether either or both these facts constitute a sufficient ground for declaring a forfeiture of its corporate franchise. So far as the ownership of the stock of a domestic corporation by non-residents is concerned, we are aware of no rule of the common law, and certainly none is prescribed by statute, which forbids it. Nor does the law require that any particular proportion of the stock of such corporation should be owned by residents, except, perhaps, in the single case where a certain part of the directors are required to be residents, and there, doubtless, by implication, the shares constituting the qualification stock of the resident directors must be held by them. But otherwise there seems to be no rule forbidding the ownership of all the stock by non-residents. Such ownership, as has been frequently decided, has no effect upon the citizenship of the corporation as affecting the jurisdiction of the federal courts; and we see no reason why, in any point of view, it should have any tendency to take from the organization the position and status of a domestic corporation. So far as we have been able to find there is no rule of law requiring the directors of corporations organized under the "Act concerning corporations," approved April 18, 1872, or any portion of them, to be residents of the state. Section 11 of article 11 of the Constitution provides that a majority of the directors of all railroad corporations shall be residents of this state, and that provision is repeated, in substance, in section 11 of the act for the incorporation of railroad companies, approved March 1, 1872. But no such provision is to be found in the Constitution or statutes applicable to those classes of corporations which may be organized, as was the one now before us, under the general law concerning corporations. The fair conclusion is that while the public policy of the state, as declared by its constitutional and statutory law, requires that a majority of the directors of railroad corporations shall be residents, no such requirement exists in case of other corporations, and that it is no violation of law, and, therefore, no ground upon which a forfeiture of its franchises can be declared, that all the directors and officers of the corporation now before the court are, and since its organization have been, non-residents.

Nor are we disposed to hold that the mere fact that the corporate books have been kept most of the time at the company's St. Louis office is, of itself, a sufficient ground for dissolving the corporation. Its two offices are on opposite sides of the Mississippi river, and but a short distance from each other. Whenever the books have been required at the East St. Louis office by any stockholder or other person entitled and desiring to see and examine them, they have been produced at that office, and there is nothing showing the slightest indisposition on the part of the corporation to have its books there when needed for any lawful purpose. It is true that keeping its books for most of the time in St. Louis may not be a strict compliance with the statute in that behalf, but it does not appear that any interest, either public or private, has been or is likely to be, imperiled or incommoded thereby. The 13th section of the statute, under which the defendant was incorporated, provides that it shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this state, correct books of account of all its business, and every stockholder in such corporation shall have the right, at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation. It would seem that the primary object of this statutory provision is to protect the rights of stockholders, and the evidence is positive that, whenever a stockholder has desired to examine the books at that place, they have been produced there for his examination. It is probable that the statute may have had other objects in view in requiring the books to be kept at the principal office in this state, as, for instance, to aid the state in exercising its visitorial power over the corporation, or perhaps to enable creditors of the several stockholders to ascertain the number of shares of stock standing in the names of each, so as to levy their executions or attachments thereon; but there is no reason to suppose that the books would not have been instantly produced whenever required for either of those purposes. It is not every failure to comply with the exact letter of the statute which will expose a corporation to the loss of its franchises. In determining whether such departure from the provisions of the act of incorporation has occurred as will work a forfeiture, the same general principles of construction are appli-

cable which govern valuable grants to individuals upon conditions subsequent or precedent. In all such cases, a substantial performance of the conditions, according to the intent of the charter, is all that is required, and slight departures are overlooked. High Extr. Leg. Rem. § 651.

Some stress is sought to be laid upon the fact that neither at the office in East St. Louis, nor at the office in St. Louis, was any sign displayed, advertising to the public the location of the office. But this circumstance seems to have very little significance, when it is remembered that the business in which the corporation was engaged involved no dealings with the general public, but only with the corporation to which its cars were leased, and that there was, therefore, very little, if any, occasion to advertise its place of business to the public.

Considerable significance is also sought to be given to the fact that the defendant's officers have never listed the corporate property in this state for purposes of taxation. Whether it was listed by the lessee, who had it in possession, is not shown. The property was all tangible property, existing in this state, and was within the reach of the officers whose duty it was to levy and assess taxes. But, even if its property escaped taxation solely through the negligence of its officers to see to it that the property was properly listed, we are unable to see how such fact would have a tendency to sustain the judgment in this case. Important as is the duty of every property holder, whether a natural person or a corporation, to have his property properly listed for the purpose of taxation, so that each may bear his proper share of the public burdens, we are not aware that a failure by a corporation to list its property for that purpose has ever been held to be an act amounting to a forfeiture of its corporate franchise.

The relator, in his argument, has relied very largely upon the case of *State v. Milwaukee, Lake Shore & Western Railway Company*, 45 Wis. 579. While we are not prepared to yield our assent, in all respects, to either the reasoning or conclusion of that decision, it is sufficient for our present purposes to distinguish that case from this by pointing out the fact that in that case there was a demurrer to the information, whereby the facts alleged were all admitted. Those facts were that the principal or general office of the corporation was in the city of New York; that the

books and records of the corporation were not, and never had been, kept within the state of Wisconsin, and were then in the city of New York; and that none of the general officers of the corporation resided in Wisconsin, but that its president, secretary and treasurer all resided in the city of New York. These facts being all admitted, it was held that sufficient ground was shown for dissolving the corporation. In some respects the decision is based upon Wisconsin statutes which are essentially different from ours. In the present case, however, issues were taken upon the allegations of the relator, and many of them failed of being proved; thus necessitating, in our opinion, a different result from that reached in the Wisconsin case.

After carefully considering the entire case, we find ourselves unable to concur with the decision of the learned judge who tried the case in the court below. The judgment, therefore, will be reversed, and the cause will be remanded to the City Court of East St. Louis.*

Corporations — failure to maintain an office in state where incorporated, as a ground of forfeiture. — The case of *Simmons v. Norfolk & B. Steamboat Co.*, 113 N. C. 147; 18 S. E. Rep. 117, is analogous to the foregoing case. The failure of the corporation to maintain an office in the state was held a ground of forfeiture. The court says: "This proceeding is brought for the purpose of obtaining a decree of dissolution against the defendant company, and the most important question to be considered is whether the complaint sets forth facts sufficient to entitle the plaintiff to the relief prayed for. The defendant was incorporated under the general act for the formation of corporations (Code, chap. 16), and it is therein provided, among other things, that all corporations so created may be dissolved by 'special proceedings' instituted by any corporator 'for any abuse of its powers to the injury of the plaintiff or of the corporators, or of its creditors or debtors.' § 694. The articles of incorporation provide that the business of the defendant shall be the 'transportation of produce and merchandise and all other kinds of freight and passengers to and from the various landings on the Roanoke river in North Carolina to and from the cities of Norfolk, in Virginia, and Baltimore, in Maryland, and to and from said cities to the said landings, and to and from all other points intermediate between said river and said cities; and its principal place of business shall be at Williamston,' in this state. The plaintiff, who is one of the corporators, alleges that in 1887 the control and management of the defendant corporation passed into the hands of non-resident stockholders, 'since which time the original aim and purpose of said corporation has been departed from, the value of the company's prop-

* Reported in 147 Ill. 234; 35 N. E. Rep. 608.

erty greatly depreciated, the business fallen away, and its general affairs gradually, but steadily, grown worse.' It is further alleged 'that for more than a year now past the defendant company has altogether ceased to operate said ports, or any of them, within this state; that no single agency or place of business has been maintained within this state, and that the town of Williamston has been absolutely discontinued as the principal place of business of said company, as required by said article of incorporation.' 'It is a tacit condition of a grant to a corporation that the grantees shall act up to the end or design for which they are incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for breach of trust. The duties assigned by an act of incorporation are conditions annexed to the grant of the franchises conferred (Ang. & A. Corp. § 776), and duties implied are equally obligatory with duties expressed, and their breach is visited by the same consequences.' Attorney-General v. Petersburg & R. R. Co., 6 Ired. 456; Field Corp. 456, note. It has been held, without reference to any express provision of law or specific requirement of the charter, that it is the duty of a corporation to keep its principal place of business, its books and records, and its principal officers within the state which incorporated it, to an extent necessary to the fullest jurisdiction and visitorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporation. State v. Milwaukee, L. S. & W. Ry. Co., 45 Wis. 579. In commenting upon this decision, Mr. Morawetz (Priv. Corp. 361) says: 'This doctrine is correct only provided the legislature has expressed the policy of the state by some special enactment, or by a general system of legislation regarding incorporated companies. There is no such rule at common law. It is always implied in the grant of a charter of incorporation, where there is no indication to the contrary, that the company shall have its central office or place of management in the state under whose laws it was organized. This, however, is merely a rule applicable to the construction of charters in determining the intention of the incorporators and of the state, and is not an arbitrary rule of law.' Accepting the principle as thus modified, and applying it to a corporation doing business, like the defendant, exclusively under a charter granted in this state, it would seem very clear that by the policy of our laws, as indicated by 'a general system of legislation,' the duty referred to is imposed upon the defendant. We have many statutes which plainly contemplate that such a corporation shall keep its principal place of business — certainly some of its agencies — within the limits of the state. Of such are sections 362 and 363 of the Code, relating to the attachment of shares of stock in corporations, and the interests and profits thereon, and authorizing the service of a certified copy of the warrant of attachment on 'the president or other head of the association or corporation, or with the secretary, cashier or managing agent thereof.' Of such also are the provisions of section 694 of the Code, authorizing the dissolution of the corporation upon the return of an execution unsatisfied upon a judgment docketed in the Superior Court of the county 'where it has its only or principal place of business.' Reference may also be had to the visitorial powers conferred upon the board of railroad commissioners, which, together with other provisions of the law, clearly show that a corporation of this character cannot entirely withdraw all of its officers

and agencies from the state. The decision in *State v. Milwaukee, L. S. & W. Ry. Co.*, supra, was based to some extent upon similar statutory provisions, and the general principle of that case has been here discussed for the purpose of showing that the express provision of the charter of the defendant, requiring its principal place of business to be at Williamston, in this state, may well be sustained by the general policy of our laws. The case is also direct authority that such a violation by a corporation of its charter is 'an abuse and mis-user of its corporate powers,' and is within the spirit and meaning of our statute upon the subject. Without considering, then, the other causes assigned in the complaint, we are of the opinion that the persistent violation of the charter in withdrawing, as alleged, the principal place of business from Williamston, and all of its agencies from the state, would authorize the court to decree a dissolution of the defendant corporation."

MERCHANTS' DISPATCH TRANS. CO. v. FURTHMANN.

(Supreme Court of Illinois, October 26, 1893.)

1. CARRIERS. INTERSTATE LAW. When goods are shipped from New York to Chicago, the contract of shipment will be controlled by the laws of New York.

2. LIMITATION OF LIABILITY. EFFECT OF BILL OF LADING GIVEN AFTER GOODS HAVE STARTED. Acceptance of a bill of lading containing conditions after the goods have been received by the carrier, and partly transported by him under an oral contract without such conditions, does not make the conditions binding on the shipper.

3. EFFECT OF RECEIPT WITH CONDITIONS ON BACK. A carrier gave a shipper a receipt for goods which referred to a bill of lading to be given thereafter, and directed attention to certain conditions printed on the back. There had been a previous oral agreement in regard to the shipment of the goods. Held, that the receipt did not constitute a contract of shipment, and that the conditions were a mere notice, not binding on the shipper.

ASSUMPSIT by Frederick Furthmann against the Merchants' Dispatch Transportation Company. Plaintiff obtained judgment, which was affirmed by the Appellate Court.

W. H. & J. H. Moore & Purcell, for appellant. *Edmund Furthmann* and *Wm. M. Johnson*, for appellee.

WILKIN, J. Appellee sued appellant in the Superior Court of Cook county to recover the value of certain beer, alleged to have been shipped by him over its line from New York to Chicago, which was spoiled and lost to the plaintiff while en route. The

trial resulted in a judgment for plaintiff for \$299 and costs of suit. This is an appeal from a judgment of affirmance in the Appellate Court. For the purposes of this decision, the following facts are accepted as established by the judgment below: On the 4th day of May, 1889, Rudolph Oelsner of New York, sent by one of his truckmen to the defendant's freight depot in that city the beer in question. The truckman received and returned to Oelsner the following receipt:

"(14) For information and bills of lading apply at office, 335 Broadway.

"NEW YORK, *May 4th*, 1889.

"Received from Rudolph Oelsner, No. 40 Reade st., in apparent good order (except as noted) the following packages (contents unknown), marked as in the margin, subject to the conditions on the back of this receipt:

<p style="text-align: center;">Marked.</p> <p style="text-align: center;">F. Furthmann, 169 N. Clark st., Chicago, Ill.</p> <p>Charges \$——.</p> <p style="text-align: right;">Owner's risk.</p>		<p style="text-align: center;">N. Y. C. & H. R. R. R. May 4, 1889.</p> <p>(20) St. John's Park.</p> <p>Twenty half bbls. beer. Bill of lading given at 335 Broad- way, N. Y., May 6, 1889.</p> <p style="text-align: right;">HURD.</p>
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"Read the conditions on the back of this receipt. C."

On the back it was stated: "The within-mentioned goods to be forwarded under the following conditions." Then followed a number of conditions.

On the sixth of May Oelsner received from the company a bill of lading as follows:

"NEW YORK, *May 4*, 1889.

"Received from Rudolph Oelsner, 40 Reade st., in apparent good order (except as noted) the following packages (contents and value unknown), marked as in the margin, viz.:

(20) Twenty hlt. bbls. beer.

Owner's risk.

Original B | L. given May 6 | 89.

"To be forwarded to Chicago, Ill.

"Under the following conditions. [Then follow conditions in the body of the bill of lading, the same as appear on the back of

the receipt, one or more of which it may be conceded would exempt the carrier from liability for the loss sued for, if binding on the plaintiff.]”

This bill of lading was duly signed. The evidence upon the trial tended to prove, and hence the verdict of the jury and judgment of affirmance by the Appellate Court have conclusively established the fact, “that, prior to the reception of the goods, the carrier agreed with the shipper to transport them in ‘cold service,’ and, before any bill of lading was made, had shipped the goods.” The contract of carriage having been entered into there, the laws of New York will control as to its nature, interpretation and effect. Authorities need not be cited in support of this proposition. It was said in *Kirkland v. Dinsmore*, 62 N. Y. 171: “It has been repeatedly adjudged in this state that the acceptance by the shipper, on the delivery of the goods for transportation to the carrier, of a receipt or bill of lading signed by the carrier, expressing the terms and conditions upon which they are received and are to be carried, constitutes, in the absence of fraud or imposition, a contract controlling the rights of the parties.” The general rule thus stated has, so far as we know, been uniformly adhered to by the courts of that state. It was, however, decided in the case of *Bostwick v. Railroad Co.*, 45 N. Y. 712, that where goods were shipped under a verbal agreement, before any written contract or bill of lading had been tendered to the plaintiff, the subsequent acceptance of a bill of lading, without assenting to its conditions, would not conclude the shipper. It was there said: “There was no contradiction attempted of the evidence of the plaintiff that he made a verbal contract with Cooke for the transportation of the fifty-four bales through to New York by ‘all rail,’ and agreed to pay the all-rail rate. The goods were shipped under this verbal agreement before any written contract or bill of lading had been tendered to the plaintiff.” The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods. The rule that prior negotiations are merged in a subsequently written contract does not apply to such a case as this.” “If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made and under which he had

parted with his property. But after the verbal agreement had been consummated, and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped." The doctrine is recognized in *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90. See, also, *Swift v. Steamship Co.*, 106 N. Y. 206; 12 N. E. Rep. 583. The scope of the latter decision on this point is accurately stated in the syllabus, as follows: "The parties made a special contract as to the transportation of the oil. Two months after its delivery at Panama, the common agent of the defendant here executed bills of lading, which were sent to plaintiff, but were not received until after the oil had left Aspinwall. The contract, as set forth in the bill, was different from that actually made. Held, that defendant could not alter or abrogate the contract actually made by issuing bills of lading, and, in the absence of proof establishing that plaintiff consented to accept the bills in place of the prior contract, the latter must control."

Leaving out of consideration, then, the receipt of May fourth, the rights of the parties would clearly be controlled by the above-mentioned verbal agreement. But counsel for appellant contend that that receipt, with its conditions, became the contract of the parties, at its date, when the goods were delivered, and continued to be the contract until May sixth, when the bill of lading was delivered, during which time the goods were en route, and, therefore, the doctrine of the *Bostwick* case has no application. Upon the facts of the case, we are clearly of the opinion that the paper delivered by the carrier to the shipper on May fourth was in no sense a contract of shipment. If, as is contended, the receipt of May fourth and bill of lading of the sixth are identical in their legal effect, and the former was intended by the parties as a contract of shipment, the question naturally arises, why was the bill of lading made? If the parties intended the receipt to be the contract of shipment, with the same conditions as the bill of lading afterwards delivered to the shipper, why were the conditions not put in the receipt, as they were in the bill of lading, instead of being merely printed on the back of it, and referred to? The proper construction of the two papers is essentially

different. The receipt is an attempt by the carrier to limit its common-law liability by notice. *Transportation Co. v. Newhall*, 24 Ill. 466; *Railroad Co. v. Hale*, 6 Mich. 244; *Newell v. Smith*, 49 Vt. 255; *Ayres v. Railroad Corp.*, 14 Blatchf. 9; Fed. Cas. No. 689; *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 288; *Express Co. v. Purcell*, 37 Ga. 103; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318. In the latter case the carrier gave a receipt for goods as follows: "Received from V. & M. Bostwick, as consignor, the articles marked, numbered and weighing as follows [wool described]. To be transported over said road to the depot in Detroit, and there to be delivered to —, agent, or order, upon the payment of the charges thereon, and subject to the rules and regulations established by the company, a part of which notice is given on the back hereof. This receipt is not transferable. Hastings, Freight Agent." On the back was printed the following: "The company will not be responsible for damages occasioned by delays, storms, accidents or other causes, * * * and all goods and merchandise will be at the risk of the owner thereof while in the company's warehouse, except such loss or injury as may arise from the negligence of the agents of the company." The action was for a loss of the wool by fire while in the depot at Detroit. Justice Davis, delivering the opinion of the court, passing upon the effect of the receipt, said: "It is insisted, however, by the plaintiffs in error, it they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharged them. The position is that the unsigned notice printed on the back of the receipt is a part of it, and that, taken together, they amount to a contract binding on the defendant in error." After referring to the cases holding that a carrier can, by special contract assented to by the shipper, limit his liability, he holds that the receipt and notice did not amount to such a contract, and says the weight of authority is against its validity. Justice Breese, rendering the opinion of this court in the *Western Transportation Case*, supra, speaking of the receipt there relied upon, said: "No distinction has been attempted to be made, nor can be made, between a public notice in the newspapers, or by hand bills, or otherwise, and the notice conveyed

by this receipt, it being printed on the back of it, for, wherever it may be found, it is but notice." Bills of lading are both receipts and contracts to carry. "So far as they acknowledge the delivery and acceptance of the goods, they are mere receipts; as to the rest, they are contracts." Hutch. Carr. 122. If the contention of appellant is correct, the paper of May fourth is a receipt for the goods, with a contract to carry certain conditions printed on the back of it signed by no one. We are clearly of the opinion that such a receipt should not be given the legal effect of a special contract, limiting a public carrier's common-law liability. No good reason can be shown why, if the intention is to so contract with the shipper in good faith, the conditions should not be embodied in the contract and properly signed, as was done in the bill of lading dated May sixth, and this we understand to be in harmony with the decisions in New York. There the Court of Appeals has, as before stated, held that where the conditions are embodied in the receipt or bill of lading, as in *Belger v. Dinsmore*, 51 N. Y. 166, the acceptance of the paper is conclusive evidence of the fact that the shipper knew its contents, and assented thereto, but we have been able to find no decision of that court giving such a construction to a mere receipt calling attention to conditions on the back of it. On the contrary, it has there been uniformly held that the liability cannot be restricted or limited by notice, whether brought home to the shipper or not. Moreover, the receipt of May fourth bears upon its face a refutation of the idea that the shipper assented to it as a contract of shipment. It states that a bill of lading is to be given thereafter. That fact also shows that neither party intended it to be more than a receipt for the goods. The evidence as to the custom of the parties in like transactions tends to support this view, and the Appellate Court have so found the fact.

In our opinion the transaction, as evidenced by the two papers, shows on its face that the only contract of shipment ever made between the parties in writing was the bill of lading issued after the goods had been shipped, and that the case is clearly within the rule announced in *Bostwick v. Railroad Co.*, *supra*. Affirmed.*

* Reported in 36 N. E. Rep. 624.

Common carriers — when receipt or bill of lading with limitations of liability not binding upon the shipper — effect of prior oral agreements or negotiations.— When goods are delivered to, and accepted by, a carrier for transportation, and no special contract is made, either oral or written, the law implies an agreement by the carrier to transport the goods under its common-law liability. 7 Am. R. R. & Corp. Rep. 281, 282. If, at the time of the delivery of the goods, a receipt or bill of lading is made out and delivered to the shipper and accepted by him, the general rule is that it will be binding upon the parties, in so far as its conditions are not contrary to law, and that, too, whether it was read or understood by the shipper or not. 7 Am. R. R. & Corp. Rep. 302–307. To the authorities there cited, which hold this proposition, may be added *Snider v. Adams Express Company*, 63 Mo. 376. A receipt or bill of lading delivered after the acceptance of the goods, and separated from such acceptance by an interval of time and so as not to be a part of the same transaction, is not binding upon the shipper, though retained by him without dissent, unless it was delivered in pursuance of a previous understanding or course of dealing. 7 Am. R. R. & Corp. Rep. 307. There is no dissent from these propositions except the second, and as to that, some courts hold that the acceptance of a receipt or bill of lading does not bind the shipper, unless he assents to its terms. 7 Am. R. R. & Corp. Rep. 304–307.

It frequently happens that there is more or less oral negotiation preceding the delivery of goods for shipment, and the question now is: What effect will such oral negotiations have upon a receipt or bill of lading delivered to the shipper at the time the goods are received by the carrier? The general rule that a written contract merges or supersedes all prior or contemporaneous oral negotiations or agreements in relation to the subject-matter of the contract, applies as well to written contracts for the transportation of goods as to other contracts. *Hutch. Carr.* §§ 126–128; *Central R. & B. Co. v. Hasselkus*, 8 Am. R. R. & Corp. Rep. 395; *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496; 16 S. E. Rep. 220; *Turner v. St. Louis, etc., R. Co.*, 20 Mo. App. 632; *Am. Trans. Co. v. Moore*, 5 Mich. 368; *Long v. New York Central R. Co.*, 50 N. Y. 776; *Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90. The question in such cases is not what effect shall be given to the written contract, but whether there *is* a written contract. If the shipper expressly assented to the terms of the receipt or bill of lading, he would undoubtedly be bound by it, no matter what had preceded it. In *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496; 16 S. E. Rep. 220, where the shipper signed the bill of lading and relied upon a prior inconsistent parol agreement, the court says: “It is to be assumed that when the plaintiff signed this contract he knew its contents; it was his duty to know, and it is not denied that he did. If it failed to speak the whole contract it was incumbent upon him to see that it did so before he accepted and signed it. The rule is well settled that resort cannot be had to a prior parol agreement to add to or vary in behalf of the shipper the terms of a special contract contained in the bill of lading accepted and signed by him before the goods are shipped, where it does not appear that this signing was the result of fraud or mistake. Here it is not pretended that

there was fraud or mistake. The contract, as signed, must, therefore, be taken as the final repository and sole evidence of the agreement between the parties, and any limitations in it not inconsistent with the law are binding upon the shipper." In support of this position the court cites the following authorities: Porter Bills of Lading, § 64, et seq.; 2 Rorer R. R. (ed. 1884) 1323; Hutch. Carr. §§ 126, 128; 2 Beach Ry. Law, §§ 962, 963; 2 Am. & Eng. Ency. Law, 228; Railway Co. v. Cleary, 77 Mo. 634; Snow v. Railway Co., 109 Ind. 422; 9 N. E. Rep. 702; Railway Co. v. Weakly, 50 Ark. 397; 9 S. W. Rep. 134; 7 Am. St. Rep. 104, and note, 117; Railway Co. v. Haswell, 91 Ala. 340; 8 So. Rep. 649; Pemberton v. Railroad Co., 104 Mass. 144; Long v. Railroad Co., 50 N. Y. 76; Germania Fire Ins. Co. v. Railroad Co., 72 N. Y. 90.

If the shipper, at the time of receiving the bill of lading or receipt, is informed of its contents or reads it over and so learns its contents and makes no objection, his assent may be conclusively presumed. 7 Am. R. R. & Corp. Rep. 302-305; Merchants' Dispatch Trans. Co. v. Joetting, 89 Ill. 152. So far there would seem to be no difficulty.

The oral negotiations which sometimes precede the shipment of goods may amount to nothing more than a proposition on the part of the carrier, or they may amount to an actual contract, a proposition made by the carrier and accepted by the shipper. In the latter case the weight of authority is that the subsequent delivery and acceptance of the goods is presumed to be under and in pursuance of the oral contract, and that the acceptance of a receipt or bill of lading by the shipper, without knowledge of its contents, does not make the latter binding upon him. *Pereira v. Central Pac. R. Co.*, 66 Cal. 92; *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462; *Blossom v. Griffin*, 13 N. Y. 569; *Gaines v. Union Transportation Co.*, 28 Ohio St. 418; *King v. Woodbridge*, 34 Vt. 565. Opposing authorities are *Long v. New York Central R. Co.*, 50 N. Y. 76; *Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90; *Harris v. Grand Trunk R. Co.*, 15 R. I. 371.

A statement of the case of *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, will be found in 5 Am. R. R. & Corp. Rep. 561.

In *Missouri Pacific R. Co. v. Beeson*, 30 Kan. 298, the suit was for the loss of two out of eighty-one racks of wool, shipped from Paola, Kansas, to Philadelphia, Penn. Sometime prior to shipping the wool the plaintiff inquired of defendant's agent at Paola what he would charge for carrying wool "to Philadelphia on a through bill of freight." The agent answered that he would have to telegraph to St. Louis. Afterwards the agent handed the plaintiff a paper showing the rate at which they would carry wool from Paola to Philadelphia. Subsequently the plaintiff delivered the wool, which was addressed to consignees at Philadelphia, Penn. The plaintiff offered to pay the freight, but the agent said they would collect it at Philadelphia. After the wool was all loaded and the cars locked the agent made out and delivered to the plaintiff bills of lading. The plaintiff accepted the bills of lading without objection or inquiry, and without knowing their contents, merely examining them to see that they correctly described the goods, the consignees and destination. The bills of lading purported to be an undertaking to

deliver the wool at St. Louis, and the defendant contended that this was the contract between the parties, and that it was not liable for a loss beyond its lines. The court held that there was a complete parol contract to carry the wool to Philadelphia at a specified price, and that the bills of lading, under the circumstances, did not supersede that contract, and a judgment for the plaintiff was affirmed. The court says: "We think it clear, from the evidence and the findings of the jury, that there was an original parol contract to carry the wool from Paola to Philadelphia at a settled price, before the wool was delivered under such contract, and before any bills of lading were made out or delivered to the plaintiff, and that it is the parol contract which must determine the rights of the parties in this case, and not the bills of lading." The court is doubtless in error in saying there was a parol contract before the wool was delivered. There was a proposition by the railroad company, but no evidence of any acceptance by the plaintiff before he delivered the wool, and the only evidence of such acceptance was the fact of such delivery. The court further says: "Of course, bills of lading are prima facie evidence of what the contract was between the parties, and it devolved upon the plaintiff to show that the contract apparently shown by the bills of lading was not the contract upon which the wool was delivered to the defendant for transportation. If no previous contract had been made between the parties the bills of lading would be conclusive evidence as to the character of the contract between the parties. And possibly, if the defendant or its agents had called the attention of the plaintiff to the particular words in the bill of lading showing that the wool was to be carried 'to St. Louis station,' or if the plaintiff, at the time of receiving the bills of lading, had read the same and made no objection thereto, the bills of lading might be considered as conclusive evidence of the character and extent of the contract between the parties. But a bill of lading signed by one party only, read by one party only and understood by one party only can hardly be held to overturn and destroy a previous contract entered into by and between both the parties, where the original contract has been principally executed and fulfilled on the part of one of the parties, and by that one who did not understand the contents of the bill of lading, and who is to suffer if the original contract is to be considered as overturned and destroyed. After the plaintiff's wool was loaded upon and within the defendant's cars and the cars locked it was hardly the proper time for the defendant to attempt to change the original contract."

A statement of *Fillebrown v. Grand Trunk R. R. Co.*, 55 Me. 462, will be found in 7 Am. R. R. & Corp. Rep. 310. In the Vermont case the plaintiff desired to send sheep to New York in time for a certain market. He applied to one Joslin, agent of the defendants, who were trustees operating a railroad, and was sent by him to W., one of the trustees. According to the plaintiff the latter agreed orally to guarantee that the sheep should arrive within the time mentioned, and thereupon the plaintiff agreed to send his sheep, and offered to pay the freight to W., but the latter said: "You can pass the money to Joslin, and he will receipt it for you." The plaintiff did so, and received what he supposed was a receipt, but what was in fact a bill of lading containing a stipulation that the trustees did not guarantee any special dispatch in transportation, unless by an express stipulation in writing. There

having been a failure to deliver the sheep in time for the market, the plaintiff sued for damages, relying upon the oral agreement. The defendants relied upon the paper writing as a defense. The court held that the paper was not complete as a contract without delivery and acceptance, and that this was a matter which rested in parol, and that if the plaintiff accepted the paper in question, supposing and having a right to suppose it was a receipt, then it was not binding upon him as a contract. Speaking of the paper the court says: "But it is claimed by defendants' counsel that as the plaintiff knew it had reference to this transaction, if he took it without reading it he did so at his peril, and is bound by its contents. It is true he knew the money he paid had reference to the contract he had just made, and supposed the receipt was a receipt for the freight he was to pay upon it, but the jury have found that from what transpired and from what was said and done, he did not suppose, and had no reason to suppose, it was anything more than a receipt for the money so to apply. The payment by the plaintiff was but a performance of his part of the contract, and a receipt for it would only be a written admission by the other party of the fact of payment; therefore, the plaintiff, although he knew the receipt was to apply to this transaction, had no reason to suppose it would contain the terms of the defendants' undertaking, as that would not be within the scope or meaning of the term *receipt*, either in the legal or popular sense. A receipt and a contract are entirely different. One discharges, and the other creates, an obligation. The plaintiff by being promised a receipt for the money, and so understanding it, had no notice that the paper delivered was a contract between the parties, so that the case in principle is the same as if the receipt he was to receive had reference to some other debt or transaction. The evidence, we think, tended to show that there never was any such delivery and acceptance of the paper, as a contract, as to make it binding as such between the parties, and the evidence was left to the jury under proper instructions, and they, having so found, were properly allowed to resort to the parol evidence of the contract."

In *Gaines v. Union Transportation Co.*, 28 Ohio St. 418, the proposition is laid down that where there is a previous verbal contract with a common carrier, as to the terms of carriage under which the goods are delivered, followed by bills of lading with restrictions not embraced in the verbal contract, the plaintiff may rely upon his previous contract, unless the contents of the bills are brought to his knowledge and assented to before the goods have gone beyond his control, and it was held to be a question for the jury whether the goods were shipped under the verbal contract or bill of lading. The case of *Jennings v. Grand Trunk R. Co.* (N. Y.), 5 Am. R. R. & Corp. Rep. 548, and note, are also important in this connection.

When a shipper makes inquiry of a carrier as to rates, or as to other matters relating to the transportation of his goods, and secures from the carrier what, in legal effect, is a proposition for such transportation, it will be presumed that the proposition is to carry subject to the common-law liability, unless otherwise specified. See 7 Am. R. R. & Corp. Rep. 281, note. If such a proposition is followed in a reasonable time by a delivery of the goods, such delivery would amount to an acceptance of the proposition, and, if there was nothing more, a contract would arise to transport the property according to

the terms of the proposition, and subject to the common-law liability, except as otherwise specified. But if the delivery of the goods is immediately followed by the making out and delivery to the shipper of such receipt or bill of lading, containing restrictions of liability, the question arises whether the contract between the parties is the one made by the oral proposition and its acceptance by delivery of the goods, or the one evidenced by the bill of lading. There is no doubt in such cases that the shipper intends to accept the oral proposition, and such acceptance would seem to be complete the instant the goods are delivered. If so, the subsequent delivery of a receipt or bill of lading to the shipper, although made as soon after the receipt of the goods as possible, and without any lapse of time except what is consumed in making out the paper, would not seem to be any more effectual to change or supersede the oral contract than in cases where the oral proposition of the shipper was accepted before the delivery of the goods. It is virtually so held in *Missouri Pacific R. Co. v. Beeson*, 30 Kan. 298, already noticed, although the court assumed that there was a complete contract before the goods were delivered.

LYONS-THOMAS HARDWARE CO. ET AL. V. PERRY STOVE MANUF'G
CO. ET AL.

(Supreme Court of Texas, November 16, 1893.)

1. CORPORATIONS. INSOLVENCY. POWER TO PREFER CREDITORS. A corporation does not possess the general power of contracting which a natural person has, but it is limited to the exercise of such powers as are expressly conferred by statute or necessarily implied.

2. Under the general principles of law applicable to such cases the assets of an insolvent corporation, which has ceased to do business, with no intention to resume, constitute a trust fund for the payment of its debts, and the corporation has no power, in such case, to execute a preferential deed of trust in favor of certain creditors, whether officers, stockholders or otherwise.

3. No such power is conferred by statutes authorizing corporations (1) "to hold, purchase, sell, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require;" (2) "to enter into any obligation or contract essential to the transaction of its authorized business;" or (3) "to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and to execute bonds or promissory notes therefor, and to pledge the property and income of the corporation," as these all relate to the purposes and business of the corporation as a going concern.

CERTIFIED questions from Court of Civil Appeals of second
supreme judicial district.

Action by the Perry Stove Manufacturing Company and others
against the Lyons-Thomas Hardware Company and others to set

aside a deed of trust. From a judgment for plaintiffs, defendants appealed.

Macey, Lightfoot & Denton and *Dudley & Moore*, for appellants. *Hale & Hale* and *T. S. Hill*, for appellees.

STAYTON, C. J. The questions submitted by the Court of Civil Appeals for decision are: "(1) Whether or not a preferential deed of trust executed by a private trading corporation (chartered in July, 1884, under general law) after it has become insolvent, and consequently ceased to carry on its business, without any intention of resuming the enterprise, is void as against the unsecured creditors of such corporation. (2) If a private corporation, under such circumstances, has the same power to prefer its creditors as an individual, whether such preferential deed is void in law because of the fact that the stockholders, directors and other officers of the corporation, who executed in the name of the corporation, are liable as sureties and indorsers on the preferred claims." Both questions present a case in which, on account of insolvency, the corporation had ceased to carry on business, and had no intention at any time to resume, when the instrument was executed through which preference was intended to be given.

The corporation was one having no powers other than such as are given by the laws of this state regulating incorporation under the general law, which of course will embrace powers, although not expressly given, that are necessary to the exercise of those which are. It is contended, however, that such corporations have all the powers to give preferences which a person has, so long as the corporate existence continues, unless such power is denied by the common law or by the statutes of this state; and in support of this proposition reference is made to the opinion in case of *Riche v. Iron Co.*, L. R. (9 Exch.) 263, in which the court was considering the powers conferred on corporations created under general acts of parliament. In the course of the opinion, referring to the case of *Sutton's Hospital*, 10 Coke, 30, it was said that was "an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal

with his own ; and, further, that an attempt to forbid this, on the part of the king, even by express negative words, does not bind the law. * * * I take it that the true rule of law is that a corporation, at common law, has, as an incident given by law, the same power to contract and subject to the same restrictions that a natural person has." The question involved in that case was whether a certain transaction was ultra vires, and its solution depended on the question whether corporations incorporated under the general law had the same powers as what may be termed "common-law corporations." On appeal to the House of Lords, it was held that a company created a corporation under the general law providing for voluntary incorporation was not a corporation possessed of inherent common-law rights, but was limited to the powers properly embraced under the law in the memorandum of association. *Iron Co. v. Riche*, L. R. (7 H. L.) 633. The English acts regulating incorporation, as do the acts in force in this state on that subject, prescribe the powers corporations organized under them may exercise, and it ought to be deemed settled law that they have only such powers as the acts under which they are created confer upon them. *Attorney-General v. Great Northern Ry. Co.*, 1 Drew. & S. 154 ; *Eversfield v. Railway Co.*, 3 De Gex & J. 286 ; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 100 ; 2 Sup. Ct. Rep. 221 ; *Thomas v. Railroad Co.*, 101 U. S. 81. In the case last cited it was contended, as in this, that a corporation created as suggested in the questions submitted may do any act not expressly or impliedly prohibited by its charter, as might corporations at common law, but in reply to this it was said : " We do not concur in this proposition. We take the general doctrine to be, in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." In *Head v. Insurance Co.*, 2 Cranch, 127, it was said : " An individual has an original capacity to contract and bind himself in such manner as he pleases. * * * But,

with those bodies which have only a legal existence, it is otherwise. The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract." In *Davis v. Railroad Co.*, 131 Mass. 259, it was said that a corporation "is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such, only, as its charter confers;" and it may be doubted if the English decisions assert any other rule, except as to corporations existing by prescription, whose existence, as well as powers, must be determined by long and uninterrupted exercise of corporate franchises. If the power thus used be for sufficient length of time as unrestricted in business as is that of a natural person, the same reason exists for presuming that a grant of such power was at some remote period made as for presuming the existence of a grant of corporate franchise from its exercise for a great number of years. It is probably true that English courts, in speaking of "corporations by the common law," refer only to those that have exercised corporate powers from time immemorial, and it may be safely assumed that no mere trading corporation was ever thus classified. Although requested to do so, if possible, counsel have been unable to furnish any decision by an English court, except the one before referred to — which, as we have seen, was expressly overruled — in which it was held that a corporation created under the acts of parliament regulating the formation and business of companies with corporate powers had any such powers as are here claimed for trading corporations created under the general laws of this state; and, in view of the learning and industry of counsel, we feel authorized to conclude that no such decision exists.

Whether such transactions as are set out in the questions propounded are consistent with rules recognized by courts of law as well as by courts of equity, and by them enforced for the preservation of rights and redress of wrongs, will be considered hereafter.

The broad proposition that a corporation created under the general laws of this state may do any act in reference to its property which a natural person may do with his is expressly negatived by the statute. The memorandum of association termed by the statute the "charter" is required to state "the purpose

for which it is formed." Rev. St. art. 567. This requirement is not solely that evidence may be thus furnished that the company is one intending to pursue a business for which the statute permits incorporation, but is also intended for the protection of those who may become stockholders or creditors, who are entitled to know in what business the corporation may engage, for without this they cannot know the extent of its powers, nor the hazards to which they may be legally exposed. The statute further provides that "no corporation created under the provisions of this title shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the objects of its creation." Rev. St. art. 589. The objects of its creation are none other than such as are named in the charter. A natural person may make any disposition of his property not forbidden by law, and may make any contract lawful within itself; but, under the plain terms of the statute referred to, a private corporation has no such power. The statute enumerates the powers of private corporations existing under it, and they will be here noticed. It declares that they shall have power "to hold, purchase, sell, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due or belonging to the corporation." Rev. St. art. 575. No such restrictions upon the power of natural persons to acquire, hold or dispose of property exist; and the manifest purpose of this statute was not so much to confer power on such corporations to hold, purchase, sell or mortgage property necessary for the proper transaction of the business named in the charter as to restrict the power of corporations to hold, buy, sell or mortgage, subject to one exception — to such property as may be reasonably necessary to the legitimate business of the particular corporation; for without such an express grant of power the incorporation of a company, without authority to carry on a specified business, would carry with it power to hold, purchase, sell, mortgage or otherwise convey property necessary to that business. Power to hold, purchase and sell property would be

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absolutely necessary to the business of any trading corporation, and power, through mortgage or like conveyance, to acquire means with which to purchase property necessary to carry on the business, would also exist. It will be observed that the powers mentioned in the statute are authorized to be exercised in relation to such property "as the purposes of the corporation shall require," and they are all powers ordinarily necessary to be exercised while a business is in active operation, with a view to obtain the results contemplated when a corporation is created, and the exercise of some of them, as the powers to hold and to purchase such property as the business of the corporation may require, would be necessary or permissible, looking to the rights of stockholders and creditors, only when the business was being carried on. If a corporation be created with power to manufacture cotton or woollen goods, its power to buy and hold raw material while the business was carried on would be clear. But suppose such a corporation to become insolvent, and on that account to cease business, with intent never to resume it. Would it be contended that it had power to buy and hold wool or cotton for purposes of speculation? The statute answers the question. Some of the powers mentioned, however, may be as advantageously used in winding up the affairs of a corporation as in carrying it on, and these are the powers to sell, mortgage and otherwise convey; but it must be kept in mind that the exercise of these powers, if we look alone to the statute under consideration as their source, is authorized only in reference to such property "as the purposes of the corporation require" to be sold, mortgaged or otherwise conveyed. If these powers stood alone, it ought to be held that they might be exercised whenever necessary or advantageous to sell, mortgage or otherwise convey, as in winding up the affairs of a private corporation; but standing in connection, as they do, with powers relating to the same property, which can be exercised upon such property only when it is necessary to carry on the corporate business then continuing, it may be doubted if the statute under consideration has any application to the winding up of the affairs of an insolvent corporation that has ceased to do business. If by the word "purposes" be meant the business or occupation, in all its phases, which the corporation, by its charter, is empowered to pursue, as is meant by the

word "purpose" in that part of the statute requiring "the purpose for which it is formed" to be stated in the charter, then it is evident that the statute has application only to powers to be used while the business for which the corporation was given existence is carried on. The power of a trading corporation to sell or to mortgage property to raise means to pay its debts during its active life, or after it has become insolvent and ceased business, is not controverted, but that is not the immediate question under consideration; for the present inquiry is, does the statute now under consideration, as claimed, expressly or by necessary implication, confer on a corporation circumstanced as was the hardware company power to make the conveyance in question? If such a power existed, we are of opinion that it must be found elsewhere.

The statute further provides that private corporations have power "to enter into any obligation or contract essential to the transaction of its authorized business." Rev. St. art. 575. This statute must be considered in connection with the one just passed from, and with any other relating to the powers of private corporations, in order to understand and arrive at the legislative intent. It will be observed that this statute empowers such corporations to enter into any contract or obligation whatever, with only one restriction, which is that the contract or obligation must be essential to the transaction of the corporation's authorized business. What was the authorized business of the private corporation making the conveyance in question? That business was authorized which its charter stated it was formed to pursue. What was that business? "Business" is defined to be "that which busies, or that which occupies the time, attention or labor of one, as his principal concern, whether for a longer or shorter time; employment; occupation." Webster: "Business is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living." *Goddard v. Chaffee*, 2 Allen, 395. "It is the synonym of 'employment,' signifying that which occupies the time, attention and labor of men for the purpose of a livelihood or profit." *Martin v. State*, 59 Ala. 36. The corporation making the conveyance in question was a private trading corporation, the business of which consisted in buying and selling for profit in the ordinary course of mercantile business. That was its business, within the meaning of

the statute, and when that ceased, without intent to resume, the business no longer existed, and no contract thereafter made could be essential to the transaction of — the doing of — that business. The mere act of paying or securing an indebtedness can never become a business. This statute is broader than that before noticed, and evidently was intended to apply only to such contracts and obligations as it might become necessary to assume or make in carrying on the business for which incorporation was given. One applies, in terms, to power over property necessary to be held or purchased to carry on the corporate business, and to property necessary to sell, mortgage or otherwise convey for a like purpose, while the other applies to every kind of obligation or contract necessary to be made or assumed because essential to the transaction of its authorized business.

The statute further provides that "corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation." Rev. St. art. 577. Was it, by this statute, intended to confer power on a corporation to borrow money, and incumber its property to secure its payment, when the corporation, because of insolvency, had ceased to do business, with intent not to resume? The limitation on the sum to be borrowed, evidently based upon the presumed ability to pay to that extent, and the fact that the pledging of the income is authorized, would seem to forbid the belief that a corporation so circumstanced was contemplated by the act, for such a corporation would have no income to pledge.

These are all the provisions of the statute affecting the powers of private corporations, and it certainly is true that they do not confer upon them, in reference to corporate property, that unrestricted power a natural person has over his own. No parts of the acts of the legislature affecting private corporations, carried into the Revised Statutes or subsequently enacted, except chapter 5, title 20, Revised Statutes, seem to have application to the winding up of the business of an insolvent corporation after it has ceased to do business, with intent not to resume, nor do they undertake to declare the rights of creditors under such circumstances, but do seem to apply only to the creation, organization,

powers, general management and like matters looking to the right to carry on, and the active transaction of, the business for which incorporation is given in the particular instance; and for this reason such parts of the statute cannot be looked to in order to determine the rights of creditors, or the powers that may be exercised by the corporation under such circumstances. Such rights and powers must be determined by the general principles of law applicable to the conditions, if they be not controlled by statute.

Among other things, chapter 5, title 20, Revised Statutes, provides that "upon the dissolution of any corporation already created by or under the laws of this state, unless a receiver is appointed by some court of competent authority, the president and directors, or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts and divide the money and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution as far as such money and property will enable them; and for this purpose they may maintain or defend any judicial proceeding." Rev. St. art. 606. These trustees are made responsible to creditors and stockholders to the extent of property and effects that shall have come into their hands. Rev. St. art. 607. By "dissolution," as here used, is meant that result which follows the expiration of time limited by its charter, or the result of a judgment of a court of competent jurisdiction declaring the dissolution. Rev. St. art. 604. The mere insolvency of a corporation followed by cessation of business, with no intent to resume, will not operate what is technically known as, "dissolution;" but it has been held in many cases, with much reason, that such condition of affairs will confer on creditors practically the same rights as they would have under technical dissolution. *Slee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 387; *Bank v. Ibbotson*, 24 Wend. 478; *Carey v. Railroad Co.*, 5 Iowa, 357; *Moore v. Whitcomb*, 48 Mo. 543; *Association v. Kellogg*, 52 Mo. 588. Article 606, Revised Statutes, establishes the proposition that a trusteeship exists in every case of dissolution to which it is applicable, and

this necessarily fixes upon the property a trust primarily for the payment of debts, and we see no good reason, so far as creditors are concerned, why the facts shown to exist by the certificate before us should not be given the full effect technical dissolution would have. If, however, that article is to be limited in its operation it indicates the legislative policy in such cases. This is illustrated by other legislation. Whenever a sale is made of the roadbed, track, franchise and chartered powers and privileges of a railroad corporation, unless a receiver be appointed, the directors or managers are made trustees for the creditors and stockholders of the sold out company, with full power to administer the unsold estate first for the benefit of creditors, and to them are responsible to the extent of property received. Rev. St. art. 4264. When there is a trustee clothed with such power over property, a trust strictly exists which the cestui que trust may enforce. This is an instance of a trust on corporate property in behalf of creditors, where there has been no dissolution of the corporation, and this is simply because the property is no longer used, or intended to be used, for the corporate purpose for which it was originally acquired.

While the general rule is that the insolvency of a corporation will not authorize the appointment of a receiver at the suit of a creditor, so long as it is honestly carrying out the business for which it was incorporated, still such appointment may be made if the creditor's right is imperiled by a threatened misappropriation of assets; and this is upon the ground that the corporate property is a trust fund to which the creditor has the right to look for payment of the debt due him. By a recent statute the appointment of a receiver is authorized when a corporation is insolvent, or in imminent danger of insolvency, as when it has been dissolved. Sayles' Civil St. art. 1461. Without considering whether there may be implied limitations to this statutory rule, it illustrates the fact that in this state mere insolvency of a corporation has been made a ground for the appointment of a receiver, doubtless for the purpose of enforcing claims against the corporate property in behalf of creditors which could not be thus enforced without recognition of the fact that the property is, at least in a limited sense, a trust fund to which creditors have the right to resort. A limited partnership, under the statutes of this

state, in a respect material to the questions before us in this case, is very similar to a corporation. The special partner is liable for debts of the partnership only to the extent of the fund contributed by him to the partnership, as is the stockholder in a corporation liable only to the extent of his stock subscription; but the legislature of this state, recognizing that all creditors of such a partnership have equal claim upon the assets of such a firm when insolvent or in contemplation of insolvency, has declared that "every sale, assignment or transfer of any property or effects of the partnership when insolvent or in contemplation of insolvency, or after or in contemplation of insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership; and every judgment conferred, lien created or security given by any such partnership under the like circumstances and with like intent, shall be void as against the creditors of such partnership." Sayles' Civil St. art. 3460. This statute simply gives legislative sanction to the proposition often asserted, and sometimes denied, in cases of insolvent corporations, that when there is no personal liability for a debt, and the creditor must look to a fund such as the capital of a corporation, that such fund is a trust fund, if the corporation is insolvent and has ceased business, to which the creditor may resort on terms of equality with other creditors who acquired no lien prior to the time the trust character attached. This statute makes a broad application of that rule, even when there is a personal liability on the part of the general partners, on the ground that as to the special partner there is no personal liability. The succeeding article denies the right even of the general or special partner, under such circumstances, to make any sale, assignment or other transfer of, or to create any lien on, property of the general or special partner, with intent to give a creditor of himself or of the partnership a preference over the other partnership creditors. Sayles' Civil St. art. 3461. Under the statutes in force in this state, if an insolvent corporation, in contemplation of an assignment under the statute, with intent to give preference to one creditor, should convey to him property of the corporation, this would be invalid as to other creditors, and the property would pass to the assignee under a subsequent assignment for the benefit of all

creditors, unless the person so taking took under circumstances that would constitute him a bona fide purchaser, which could not well be if the corporation was insolvent, and was known to have ceased business on that account; for such knowledge, of itself, would seem sufficient to put the purchaser on inquiry. Sayles' Civ. St. art. 65i. This statute further illustrates the fact that the property of an insolvent corporation is deemed in this state a trust fund, and emphasizes the right of all of its creditors to equality in distribution of its assets, as against all other creditors who had not acquired superior right prior to known insolvency.

In the application of principles illustrated by this statute ought the fact that the insolvent corporation subsequently made no general assignment, and made, in effect, only mortgages conveying all of its property, as, from the papers certified by the Court of Civil Appeals, appears to have been the case, to affect the rights of the parties? The mortgages, if sustained, would give preferences as fully as would absolute conveyances, and all of the corporate property, if not more than sufficient to pay the preferred claims, would pass from the corporation as fully as would it by subsequent assignment. These statutes have been referred to, not because any of them, in terms, declare the law applicable to the questions propounded, but because they indicate the trend of legislation on some essential matters involved in the questions, and tend to support the proposition, through analogies, that the assets of an insolvent corporation, which has ceased to carry on business, and does not intend to resume, is a fund from which all creditors, not secured by valid liens existing before the condition was fixed, have the right to be paid on terms of perfect equality. If such a fund be a trust fund, then the assets of a corporation so circumstanced are trust funds, and those whose right and duty it is to administer such a fund are trustees.

We have seen that such corporations as the hardware company, in England and in this state, have not the same powers in reference to property owned by them for corporate purposes as have natural persons, and that in this state there is no statute, expressly or by necessary implication, conferring on such corporations power to make preferential mortgages or like conveyances, when in the condition assumed in the questions propounded; and the question arises whether, under the general principles of law or

equity applicable to such a condition, such a power exists. No English decision has been furnished in which the questions involved arose or were discussed; and it is probably true that the laws of that country in regard to insolvent corporations and persons have been such, for three centuries past, that no claim would be made in the courts of that country that such conveyances as the questions submitted refer to were valid against other creditors. We take it for granted that all English courts, under the laws of that country, would hold all such attempted preferences unauthorized and illegal, when made by an insolvent corporation circumstanced as was the hardware company, and, therefore, seek no further for authority from that source. It would be a useless consumption of time to review the many American decisions bearing on the questions submitted, for it must be conceded that they are clearly in conflict, and that on each side of the question may be found many decisions made by courts eminent for learning and conservatism, but reference will be made to a sufficient number on each side of the question to show the grounds on which these conflicting decisions rest.

Catlin v. Bank, 6 Conn. 233, is a leading case, and is understood to rest on substantially the same facts presented in the first question certified, except that it does not appear that there was no intention to resume the corporate business. While conceding that such corporations derive their powers solely from their charters, it was assumed that an insolvent corporation which had ceased to do business had the same power in the management and disposition of its property as had natural persons, and that for this reason the officers of such corporation might prefer creditors. It was further held that under such circumstances no trust relation existed between the managing officers of the corporation and creditors, and that no trust attached to the property of the insolvent corporation in behalf of creditors. In *Dana v. Bank*, 5 Watts & S. 223, preference was given to named creditors through conveyance of property in trust to be sold for their benefit, when the corporation was insolvent; but it does not appear that this was done after the corporation had ceased to do business, or that this made cessation of business necessary, nor that this was contemplated. The court held that, under the principles of the common law, such corporations had certain powers

enumerated, and power to do all other acts that a natural person had, unless restrained by its charter or some other act. In the course of the opinion it was said: "Although there are some restrictions placed on the bank by the act establishing it, yet it cannot be pretended, or at most cannot be shown, that the bank, or its president and directors, are either expressly or impliedly restrained from giving, directly or indirectly, preference to some of its creditors over others, and, not being restrained in this respect by this or any other act, it must be deemed to have the same power to make a distinction between its creditors, and to give preferences to some of them over others, that any natural person has." In *Wilkerson v. Bauerle*, 41 N. J. Eq. 636; 7 Atl. Rep. 514, it appeared that the directors of a corporation transferred all of its assets to one of its directors after it became insolvent. The sale was made to give preference, and this, by other creditors, was claimed to be illegal as to them, but the court said: "The correctness of this view, and the success of the contention now made, depend upon the legislation now in force respecting this subject; for if there be no legislative prohibition against the transfer of corporate property, or its use in preferring creditors after insolvency, no reason can be given why such transactions should be invalidated which would not also invalidate the like transactions of individuals." It was held in that case, however, as the purchaser was a director who took part in the transaction, that it was incumbent on him to show that he paid fair value for the property, or otherwise he should be held responsible for the difference between that and the price paid. In *Pyles v. Furniture Co.*, 30 W. Va. 123; 2 S. E. Rep. 909, it was held that an insolvent corporation, having ceased to do business, has the same power as an insolvent individual to prefer a creditor in a general assignment of all its property for the payment of its debts; but it seems this decision was controlled by a statute, but for which the court would have held otherwise, as is shown in the opinion, as well as by the cases of *Lamb v. Laughlin*, 25 W. Va. 300, and *Lamb v. Cecil*, 28 W. Va. 653. In *Warfield v. Marshall Co. Canning Co.*, 72 Iowa, 670; 34 N. W. Rep. 467, it is said, speaking in a case in which the effect of a mortgage to directors was to defeat the claims of other creditors: "The mortgagees, it is true, were officers and stockholders of the corporation; but, notwithstanding that fact,

they had the right to procure the corporation to execute the mortgage, although other creditors of the corporation are unable to obtain the payment of their indebtedness. Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals. Code, § 1059. Such is the rule in the absence of a statute, and, therefore, it has the right to prefer one creditor to another. 2 Mor. Priv. Corp. § 802. The fact that the preference is exercised in favor of directors or shareholders of the corporation is immaterial, although the director or shareholder may have voted for the proposition, and the security given was to secure an indebtedness to himself." The facts of that case, it is proper to say, may not have been practically the same as those made the basis of the questions propounded, but it tends to show the grounds of decision, holding that, at all times prior to technical dissolution, corporations have power, when insolvent, to give preferences even to directors. Many other cases might be referred to bearing on both states of fact presented in the questions propounded, but those already noticed give substantially the grounds on which rest all the opinions holding such transaction legal.

Rouse v. Bank, 46 Ohio St. 493 ; 22 N. E. Rep. 293, involved the facts presented in the first question propounded, and in that case the doctrine that corporations have the same power over corporate property as have natural persons was denied. Approving the principles announced in Wood v. Dummer, 3 Mason, 311 ; Sanger v. Upton, 91 U. S. 52, and Curran v. State, 15 How. 312, and quoting with approval from the opinion, it was held "that where a corporation for profit * * * becomes insolvent and ceases to carry on its business, or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors, in proportion to the amounts of their respective claims, and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf over the other creditors, or over an assignment thereafter made for the benefit of creditors." The case of Marr v. Bank, 4 Cold. 471, involved substantially the same facts, and therein the same rules were announced with citation of many cases. The case of Appleton v. Turnbull,

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84 Me. 72; 24 Atl. Rep. 592, rested on facts which made it necessary to determine the character of the assets of an insolvent corporation and the rights of its creditors, and in the opinion it was said: "It is too firmly established at the present day to be questioned that the capital stock of a corporation is a trust fund for the payment of its debts. It is a substitute for the personal liability of the individual members of private partnerships, and those who deal with the corporation have a right to rely upon its capital stock for their security. Unpaid stock is as much a part of the assets of the corporation as the money that has been paid in upon it. * * * During the existence of the life of the corporation it is a trust to be managed for the benefit of the stockholders; but, in the event of its dissolution or insolvency, it becomes a trust fund for the benefit of its creditors. If in such case the assets are not sufficient to pay all its debts in full, each creditor is equitably entitled to receive a ratable share of the assets which remain. * * * In such cases the doctrine laid down by the courts for thirty years is that they must pay up their shares in full and are entitled only to a ratable distribution of all the company's assets, and are to receive dividends upon their claims against the corporation in common with other creditors. Mor. Priv. Corp. § 861; Cook Stock & S. § 193. The rule was settled by the Supreme Court of the United States in *Sawyer v. Hoag*, 17 Wall. 610, where the court say: 'The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.' *Scovill v. Thayer*, 105 U. S. 143, 152; *Sanger v. Upton*, 91 U. S. 56; *Stockton v. Bank*, 32 N. J. Eq. 163, 167; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Wheeler v. Miller*, 90 N. Y. 353. The same rule prevails in England, as may be seen in the leading decision of *Grissell's Case*, 1 Ch. App. 528. If the defendant's rights, as well as his duties, were to be determined by the common law alone, it is evident that the defense interposed in this case could not prevail." In *Mill Co. v. Kampe*, 38 Mo. App. 229, the general questions

involved in this case were considered; and after stating the general powers of a corporation while carrying on its business, and the right to protection persons obtaining preferences in good faith would be entitled to, the court said: "But these principles are only applicable to what may be termed or designated as 'going concerns.' They cannot be applied to insolvent corporations. By this we do not wish to be understood as deciding that a corporation that is financially embarrassed will be deprived of the right to deal with its corporate property in a legitimate and proper way; but we do say that when the corporation is hopelessly insolvent, and there is no reasonable or well-founded hope for a continuation of its business, and these facts are known to its officers and directors, then all of the assets of the corporation become a trust fund in the hands of the directors, to be administered by them as trustees or agents for the equal benefit of all the creditors of the concern, and any attempted preference in favor of the directors themselves, or of a stranger, will not be upheld. *Williams v. Jackson Co. Patrons*, 23 Mo. App. 132; *Roan v. Winn*, 93 Mo. 503; 4 S. W. Rep. 736; *Foster v. Mill Co.*, 92 Mo. 79; 4 S. W. Rep. 260." The same reasons for denying an insolvent corporation, so circumstanced, power to give preferences, are announced with much clearness and force in the following cases: *Olney v. Land Co.*, 16 R. I. 597; 18 Atl. Rep. 181; *Haywood v. Lumber Co.*, 64 Wis. 639; 26 N. W. Rep. 184; *Beach v. Miller*, 130 Ill. 162; 22 N. E. Rep. 464; *Corey v. Wadsworth (Ala.)*, 11 South. Rep. 350; *Turnbull v. Lumber Co.*, 55 Mich. 387; 21 N. W. Rep. 375; *Adams v. Milling Co.*, 35 Fed. Rep. 433; *Howe, Browne & Co. v. Sandford, Fork & Tool Co.*, 44 Fed. Rep. 231; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7.

The line of decisions first referred to, in substance, holds that insolvent corporations, even though they have ceased to do business, have the same power to give preferences as have natural persons, on the theory that, unless their charters forbid this, it is an implied power; but this seems indefensible under the rules applicable to the construction of charters such as may be granted to private corporations under the general laws in force in this state. The power is not expressly given, and it cannot be implied, for it is not necessary to the accomplishment of any purpose for

which such corporations may be created. While such a corporation is carrying on its business, it has power to buy on credit such property or to secure such services or funds as may be reasonably necessary for the transaction of its legitimate business, and, to secure indebtedness thus incurred, may give mortgages or other security, and thus give preferences, although in fact insolvent. The exercise of such a power may often be, not only beneficial, but necessary for the continuance or prosperity of the business; but no such necessity can exist where the business has been abandoned. Self-interest, while the business is honestly carried on, will ordinarily be sufficient to prevent abuse of what is then a right; but where the business has ceased, on account of insolvency, stockholders have no further beneficial interest in the corporate assets, and they can have no right or power, directly or through the managing officers, through preference, in effect, to pay or secure some of the creditors at the expense of others, if the law be that the assets of an insolvent corporation, that has ceased business, with no intent ever to resume, are a fund held in trust for creditors, for in such a fund all creditors have equality of right, unless, prior to the condition which gives that, one or more have acquired right to priority.

The second class of cases to which reference has been made seems conclusively to establish the proposition that the assets of a private corporation circumstanced as was the hardware company at the time its directors attempted to give preferences are a trust fund held for the benefit of creditors — a fund which they have the right to have converted into money, and that distributed among them ratably. The reasons for holding the assets of such an insolvent corporation to be a trust fund for the payment of its debts are set forth so clearly and fully that we will not undertake to restate them, or to give additional reasons, but will simply refer to some of the opinions giving the grounds, among which are the following: *Wood v. Dummer*, 3 Mason, 308; *Curran v. State*, 15 How. 315; *Sanger v. Upton*, 91 U. S. 60; *Marr v. Bank*, 4 Cold. 476; *Sawyer v. Hoag*, 17 Wall. 610; *Morgan Co. v. Allen*, 103 U. S. 508. The subject is elaborated by elementary writers. *Tayl. Priv. Corp.* 654–659; *Mor. Priv. Corp.* 780–803; *Wait. Insol. Corp.* 142–157; *Wat. Corp.* 120–140; *Cook Stock & S.* 199; *Ang. & A. Corp.* 600–604.

Whatever technical objections may be urged in the use of the words "trust" and "trustee" in such a connection is a matter of no importance, for the substance of the matter is that the word "trust" is used to express the fact that creditors of an insolvent corporation have the right to have the specific property owned by the corporation subjected to the payment of the sums due them; and the word "trustees" is used to give expression to the fact that the directors and other managing officers of such a corporation, lawfully having possession and control of such assets, are under obligation so to apply them. If more appropriate terms be suggested, courts, no doubt, will be willing to adopt them. All of the decisions of the Supreme Court of the United States are understood to hold that those terms properly describe the relation between creditors of an insolvent corporation and its assets, and officers lawfully controlling them, and to give the usual effect to such relations; but it is suggested that the opinion in *Purifier Co. v. McGroarty*, 136 U. S. 241; 10 Sup. Ct. Rep. 1017, casts a doubt upon this subject, or suggests limitations that would affect the questions involved in this case. The opinion is not so understood, and it may be true that the real difficulty some courts may have had was not so much any doubt upon the question whether the assets of an insolvent corporation were a trust fund which creditors had a right to have subjected to payment of sums due them, as was it on account of a doubt as to the time when, and circumstances under which, such right so attached as to cut off all power of directors, or even of stockholders, to confer upon any person, as a creditor, by way of preference, a right inconsistent with the right of all creditors to a ratable distribution of the proceeds of such assets, as against all other creditors not holding legal priorities. The cases cited in the opinion referred to will be noticed, with a view to illustrate the fact that no limitation of the general rule was intended, as well as to show when that court has understood the rule to become operative as to creditors. In case of *Graham v. Railroad Co.*, 102 U. S. 148, it appeared that a solvent corporation, with no fraudulent intent, disposed of lands for an inadequate consideration, and a subsequent creditor sought to apply the rule in his favor, but the court held that he could not question the transaction. The court, however, said: "When a corporation becomes insolvent, it is so far civilly

dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." In *Richmond v. Green*, 133 U. S. 30; 10 Sup. Ct. Rep. 280, it appeared that Richardson loaned a sum of money to a railroad company, and as a bonus therefor received shares of paid-up stock and bonds, and was given practical control of the board of directors; and he afterwards received other bonds as further collateral, when he proposed to make further advances, if 300 other bonds were put in his hands as collaterals. This was done, but he advanced no more money, and after the insolvency of the company he claimed to hold the bonds last mentioned and those given as further collaterals to secure the sum lent. When these things occurred he was acting as treasurer of the company. It was held that, as between him and other creditors of the company, he could not, under the circumstances, hold them as collateral for his debt. The bonus was also held to be illegal. The court quoted with approval so much of the opinion in *Graham v. Railroad Co.* as has been inserted, and from the opinion in the case of *Railway Co. v. Ham*, 114 U. S. 587; 5 Sup. Ct. Rep. 1081, as follows: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among its stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor without authority of law and in fraud of existing creditors is void as against them." And the court then said that "the principle underlying all of the decisions which we have cited upon this point is that the capital stock of a corporation, when it becomes insolvent, is, in law, assets of the corporation, to be appropriated to the payment of its debts, and that creditors have the right to assume that the stock issued by a corporation and held by its stockholders as paid-up stock had been paid up, or, if unpaid, that a court of equity, at the instance of the proper parties, could require it to be paid up."

In *Fogg v. Blair*, 133 U. S. 534; 10 Sup. Ct. Rep. 338, also cited, it appeared that a railroad company, in purchasing the road and property of another company, agreed to pay a claim held by a person against the latter company, but in no way secured by lien on its property, and after the sale the holder of that claim sought to give it priority over a mortgage made by the purchasing company to secure an issue of bonds; but the court held that this could not be done, and in the course of the opinion said: "We do not question the general doctrine invoked by the appellant, that the property of a railroad is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred or mortgaged to bona fide purchasers except subject to the liability of being appropriated to pay that indebtedness." The case of *Peters v. Bain*, 133 U. S. 670; 10 Sup. Ct. Rep. 354, while it asserts the general rule as to the trust character of the assets of a corporation and the relation of directors to that and to creditors, seems to have no application to any question involved in questions submitted.

In so far as the rights of creditors of an insolvent corporation are concerned, there exists no good reason for making any distinction between unpaid subscriptions for stock and other corporate assets, for each belong to the fund from which creditors are entitled to be paid. As we have before seen, in so far as the rights of creditors are concerned, the consequences of technical dissolution occur when the corporation is in the condition set forth in the questions propounded, and in addition to the authorities cited on that point the following are now added: *Graham v. Railroad Co.*, 102 U. S. 161; *Railway Co. v. Ham*, 114 U. S. 587; 5 Sup. Ct. Rep. 1081; *Corey v. Wadsworth*, (Ala.) 11 South. Rep. 353. In the case last cited, after announcing the general principles governing the assets of an insolvent corporation, the court answered a question involved in cases of that character as follows: "At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principles

we have declared? It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so; in other words, if it be, in good faith, what is sometimes called a 'going' business or establishment. Many successful corporate enterprises, it is believed, have passed through crises where their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent." The case made by the questions propounded bring it clearly within so much of the rule thus stated as may be safely adopted, and it is not now necessary to inquire whether other parts should be qualified. The condition of the corporation, set forth in the questions propounded, under the long-recognized rules of equity, conferred upon every unsecured creditor of the corporation the right to a ratable share of the proceeds of all the assets of the corporation, not subject to priorities lawfully existing when this condition arose; and we, therefore, answer that neither the stockholders nor directors of the insolvent corporation had lawful power, under the facts stated, to make a preferential deed of trust, whereby any creditor, whether a stockholder, director or other officer of the corporation or not could acquire a preference, and that the attempted preference would be invalid as to other creditors of the corporation.*

1. Right of insolvent corporation to prefer creditors.—A number of recent decisions have been made on the right of an insolvent corporation to prefer creditors. The subject has been discussed and the authorities collected to a greater or less extent in recent notes and articles as follows: 38 Cent. L. J. 240; 37 Cent. L. J. 433; 8 Nat. Corp. Rep. 65; 34 Am. St. Rep. 856; 10 N. Y. L. J. 1280; 23 Am. Law Rev. 1009; 27 Am. Law Rev. 846. The authorities are extensively cited and reviewed in the opinion of the principal case and its conclusions have recently been affirmed in a second appeal of the same case. *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, (Tex.) 27 S. W. Rep. 100.

* Reported in 24 S. W. Rep. 16.

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The view of the principal case that preferences by insolvent corporations are illegal is sustained by the following recent cases: *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; 22 N. E. Rep. 293; *Damarin v. Huron Iron Co.*, 47 Ohio St. 581, 26 N. E. Rep. 37; *Thompson v. Huron Lumber Co.*, 4 Wash. 600; 30 Pac. Rep. 741; 31 Pac. Rep. 25; *Adams & Westlake Co. v. Deyette*, (S. D.) 59 N. W. Rep. 214; *Ford v. Plankinton Bank*, (Wis.) 58 N. W. Rep. 766; *Hill v. Pioneer Lumber Co.*, post, and note. In the first of these cases it is said: "It is now firmly established that the property and assets of a corporation are a trust fund for the payment of its debts, especially in case of its insolvency. * * * It being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows that, after the insolvency of the corporation is ascertained, and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property become trustees thereof for the creditors, and this relation necessarily forbids any discrimination between the beneficiaries in the distribution or application of the fund. The due execution of the trust demands absolute impartiality towards the cestui que trust. They must be treated alike, and no preference can be made among them without a direct violation of the duties arising from the relation. It would seem clear that if the corporate property constitutes a fund for the creditors, it is as much so for one creditor as for another, and that the directors in possession are without authority to dispose of it in disregard of the rights of any creditors. They can no more discriminate between creditors in such case than they could, before the insolvency of the corporation, between the shareholders. The objects for which the corporation was created being no longer prosecuted, and the occasion for the exercise by the board of directors of the power of control and disposition of the property for such purpose having ceased, there remains no purpose to which its assets can lawfully be devoted, except to the payment of the debts. In equity the corporate property becomes the property of the creditors, and their equities are equal. Every creditor who became such by parting with his money, property, or other things of value, to the corporation, contributed to the accomplishment of its purposes, and augmented its corporate fund; and, when the fund is no longer demanded for the purposes of the corporation, the rights of the creditors became fixed instantly and equally, for each having contributed to the common fund has an interest in it in proportion to his claim, equally with every other creditor. This interest is sometimes called the equitable lien of the creditor on the corporate property, which enables him to follow it, even after it has left the hands of the directors, wherever it can be found, except in the possession of bona fide purchasers for value, and subject it to the payment of the corporate indebtedness. It would seem to result as a necessary consequence that insolvent corporations, which have ceased to carry on business, cannot, by pledge or mortgage of the corporate property to some of the creditors in payment or security of antecedent debts, create valid preferences in their favor over others; and it is maintained by the more recent writers on the subject that such preferences cannot be made."

In this case the directors of the corporation in question on the same day voted to secure certain creditors, and also to make a general assignment. The

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security was given and the general assignment made also on the same day. The preference was held void. In the subsequent case of *Damarin v. Huron Iron Co.*, 47 Ohio St. 581 ; 26 N. E. Rep. 37, it appeared that the Huron Iron Company, on the 27th of September, 1882, gave mortgages to secure an existing indebtedness to certain banks which were then pressing for payment or security. At this time the iron company was actually insolvent, but its general credit was good and it was still carrying on business. At the meeting of directors at which the mortgages were voted it was also voted to continue business under the management of D. if they could do so. At the same time, in view of the contingency that other creditors, learning of their action, might move against the company, it was voted that, if they did so, a suit should be procured to be brought against the company, and its property placed in the hands of a receiver, and the name of the plaintiff and of the receiver were agreed upon. The very next day, September twenty-eighth, D. having refused to continue as manager, the corporation procured a suit to be brought against it, and a receiver to be appointed. It was found by the trial court that the banks were ignorant of the iron company's insolvency, although they knew it was financially embarrassed, that the company intended to continue business, and that all parties acted in good faith. The validity of the mortgages was sustained by the trial court and by the Supreme Court. In the opinion of the latter court it is said : "The right of a company, though embarrassed, to continue its business and to retrieve its fortunes, if possible, must be conceded to it as well as to natural persons, and this right necessarily carries with it the power to obtain an extension of credit by giving a mortgage upon its property to such of its creditors as are unwilling to give further time unless so secured. When this power is fairly and honestly exercised, with no purpose at the time of immediately abandoning business, or making an assignment, the validity of a security so obtained cannot well be questioned. We might, upon the evidence in this case, have arrived at a different conclusion from the court below as to whether there was any actual intention on the part of the company or its officers to continue business after the execution of these mortgages. There are a number of things in the evidence that might be regarded as casting a doubt upon this question. Still, it is not the practice of this court to weigh the evidence, but to accept the facts as they have been found by the court in which the evidence was heard."

A corporation is not to be regarded as insolvent within the meaning of the rule held in the above cases merely "because it is unable, by reason of a dull market or other cause, to meet its obligations in the ordinary course of business at maturity, or because sufficient could not be realized from its property at forced sale to pay its debts." *Sabin v. Columbia Riv. Lumber & Fuel Co.*, (Oreg.) 35 Pac. Rep. 854; S. C., 34 Pac. Rep. 692. As to when, in the downward progress of a corporation towards complete bankruptcy and suspension of business, the exact point is reached when it becomes insolvent within the rule, the same case answers that the rule "can only apply, if at all, when that point in the affairs of the corporation is reached when its managers find themselves obliged to deal with its assets in view of a suspension by reason of its insolvency, but not while the corporation is in good faith engaged in the business for which it was organized, although in fact it may be insolvent."

And upon the same point the court in *Corey v. Wadsworth*, (Ala.) 11 South. Rep. 350, says: "At what stage in a corporation's affairs must it be pronounced insolvent so as to bring it within the principle we have declared? It is not enough that its assets are insufficient to meet all its liabilities if it be still prosecuting its line of business with the prospect and expectation of continuing to do so; in other words, if it be in good faith what is sometimes called a 'going' business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent." See, also, *Lyons-Thomas Hardware Co. v. Perry Stove Co.*, (Tex.) 27 S. W. Rep. 100.

In *Gould v. Little Rock, etc., R. Co.*, 52 Fed. Rep. 680, which arose in Arkansas, it was held that the right of a corporation to prefer one or more of its bona fide creditors to the exclusion of others, in the absence of a statute prohibiting it, is as unrestricted and absolute as is the common-law right of an individual debtor to make preferences among his creditors. This rule is said "to be in harmony with the general, though not quite uniform, current of authorities in this country on the question," citing the following cases: 2 Mor. Corp. § 802; *Allis v. Jones*, 45 Fed. Rep. 148; *Covert v. Rogers*, 38 Mich. 363; *Coats v. Donnell*, 94 N. Y. 168; *Dana v. Bank*, 5 W. & S. 223; *Warren v. Miner*, 11 Vt. 390; *Whitwell v. Warner*, 20 Vt. 426; *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; 7 Atl. Rep. 514; *Duncomb v. Railroad Co.*, 84 N. Y. 190; 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Peterson v. Brabock Tailoring Co.*, (Ill.) 37 N. E. Rep. 242; *Buell v. Buckingham*, 16 Iowa, 284; *Hallam v. Hotel Co.*, 56 Iowa, 178; 9 N. W. Rep. 111; *Garrett v. Plow. Co.*, 70 Iowa, 697; 29 N. W. Rep. 395; *Smith v. Skeary*, 47 Conn. 47; *Bank v. Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Penn. St. 814; *Sargent v. Webster*, 18 Met. 497. To this list may be added the case of *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 6 Am. R. R. & Corp. Rep. 61, which supports the same rule.

The rule that an insolvent corporation cannot make preferences is founded upon the doctrine that the assets of an insolvent corporation constitute a trust fund for the payment of creditors. This doctrine, as applied to unpaid subscriptions for stock, is considered in the note to *Handley v. Stutz*, 4 Am. R. R. & Corp. Rep. 482. The doctrine has received some very serious blows in the recent decisions of *Fogg v. Blair*, 133 U. S. 534; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, and *Hospes v. N. W. Mfg. & Car Co.*, (Minn.) 5 Am. R. R. & Corp. Rep. 562. In the first of these cases it is said: "That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred or mortgaged

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to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence." The same views are repeated in the second case cited, and it is further said: "Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation and its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Page 383. The suit was a bill in equity by a single contract creditor, on behalf of himself and all other creditors, who should become parties, to have a certain mortgage on the corporate property declared void, and to have the property sold and applied on the debts of the corporation. It was held that the plaintiff had no equity to stand on, and that the bill should have been dismissed for want of jurisdiction. "A party may deal with a corporation," says the court, "in respect to its property, in the same manner as an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon." The same views are forcibly maintained by the Supreme Court of Minnesota in the case cited. See 5 Am. R. R. & Corp. Rep. 562.

Even if the fullest effect be given to the trust fund doctrine, one who has obtained property from an insolvent corporation, with notice of its insolvency, can convey a good title thereto to one who pays full value therefor, and has no notice of any defect in the seller's title. *Walker v. Miller*, (U. S. Circ. Ct. of App.) 59 Fed. Rep. 869.

2. Corporations — insolvency — statutes making claims for labor preferred.— For the construction of such statutes generally see *Pendergast v. Yandes*, 3 Am. R. R. & Corp. Rep. 645, and note. A person who, while laboring himself, employs men, several teams owned by himself, and other hired teams in performing a contract with a firm, is not a wage earner, within the protection of Laws of Michigan, 1887, act 94, providing that all debts owing for labor by any person or corporation at the time of becoming insolvent shall be preferred claims against the estate. In *re Clark*, 92 Mich. 351; 52 N. W. Rep. 637. Lumber inspectors were held not within the same statute in case of *In re Sayles*, 92 Mich. 354; 52 N. W. Rep. 637, the compensation being for their judgment and integrity rather than for the manual labor performed by them. An experienced miller was employed by a corporation engaged in manufacturing mill machinery and fitting out mills, to adjust and start machinery in mills supplied by it, and to operate the same until it fulfilled the contract of

his employer with the millowner, or to discover and report wherein it was deficient, such employment being similar to that of the head miller in a mill, involving much manual labor, and requiring a high degree of skill. Held, that his claim for compensation was within the meaning of the same statute. *In re Black*, (Mich.) 47 N. W. Rep. 342.

Revision New Jersey, page 188, section 63, as amended by Public Laws 1887, page 99, which gives an employee of an insolvent corporation a lien for his services on the assets in the receiver's hands, does not entitle him to priority over a mortgagee whose mortgage was executed and recorded before the services were rendered; and, where the foreclosure sale does not produce more than sufficient to satisfy the decree, the employee is not entitled to share the proceeds. *Hinkle v. Camden Safe Deposit & Trust Co.*, 47 N. J. Eq. 333; 21 Atl. Rep. 861.

HILL ET AL. v. PIONEER LUMBER Co. ET AL.

(Supreme Court of North Carolina, October 31, 1893.)

1. CORPORATIONS. INSOLVENCY. RIGHT OF DIRECTOR TO SECURE JUDGMENT. The capital of an insolvent corporation is a trust fund for the payment of its debts, and a director of such a corporation, who is also a creditor, cannot take advantage of his superior means of information to obtain a judgment by confession from the corporation, and so secure his debt as against other creditors.

ACTION by I. F. Hill and others against the Pioneer Lumber Company, G. A. Griswold and others, to set aside for fraud a judgment confessed by defendant company in favor of defendant Griswold.

Busbee & Busbee, for appellants. *Aycock & Daniels*, for appellees.

MACRAE, J. This case is presented to us as upon a demurrer, all the facts alleged in the complaint being admitted in the answer, and the conclusion of law contended for by the plaintiff being denied, thus raising the issue of law whether the facts stated in the complaint constitute a cause of action. It is admitted in the pleadings that, at the time of the confession of judgment in favor of G. A. Griswold against the Pioneer Lumber Company, the defendant corporation was insolvent; that said Griswold and one Hall were the only stockholders, and constituted the board of directors; that said Hall was president and said Griswold was

secretary and treasurer of said corporation, and that Griswold was present at and participated in the meeting at which resolutions were adopted directing Hall, as president, to confess judgment against the company in favor of Griswold. On this state of facts the plaintiff I. S. Hill contends that the directors became trustees of the corporate property for the benefit of the creditors, and could not take advantage of their knowledge and position to gain an advantage over the other creditors. We advert to the fact that there appear to be but two members of the defendant corporation. But for the admission in the answer we might inquire whether there has been such an incorporation as is permitted by section 677 of the Code, as this privilege is extended to any number of persons not less than three. However, as the answer admits that the said defendant is a corporation duly created by the laws of North Carolina, we will proceed at once to the consideration of the only question presented — whether an insolvent corporation may confess judgment under the statute to a director in the same, who is also a creditor.

There may have been a discussion at an earlier day as to the precise relation in which a director stands to the corporation of which he is an officer — whether an actual or a quasi trustee for the shareholders, and, in case of the insolvency of the corporation, for the creditors also. But there can be no doubt that he occupies a fiduciary relation to the company, which, by virtue of his office, he represents in the management of its principal functions ; neither can there be any doubt that the capital stock and property of the corporation, in case of its insolvency, constitute a fund, first, for the satisfaction of its creditors, and next for the shareholders. As is said by Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 610 : “ Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation, and when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.” As it is stated in 2

Story Eq. Jur. § 1252: "Perhaps to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of constructive trusts by operation of law) we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debt of a corporation, so that the creditors have a lien or right of priority of payment on it in preference to any of the stockholders in the corporation." This doctrine was clearly stated by Mr. Justice Story in *Wood v. Dummer*, 3 Mason, 311, in 1824, and has been generally followed and announced in the treatises on this branch of the law ever since that time. 2 Mor. Priv. Corp. § 780; 1 Beach Priv. Corp. § 116. And we are not without authority in our own court for the same principle, as very clearly stated in an interesting and able opinion of the late Mr. Justice Davis in *Foundry Co. v. Killian*, 99 N. C. 501; 6 S. E. Rep. 680. This much being established, we may find the duty and liability of the director laid down in the very many, and sometimes diverse, decisions in the leading courts of this country. As he is selected and intrusted with the management of the affairs of the corporation, and has charge of its property and business, it applies to him that, "whenever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage." 1 Story Eq. Jur. § 323. As a sequence to the foregoing propositions, we find: "An insolvent corporation being indebted to its officers and directors, they executed the notes of the corporation in their own favor, and having obtained judgment by default, issued execution thereon. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation, held, that this conduct of the officers was a fraud in law, which gave them no preference over general creditors in the distribution." *Hopkin's Appeal*, 90 Penn. St. 69, cited as an illustration under the head of "Liability of Directors for Fraud," 1 Lawson's Rights, Rem. & Pr. § 343. In 17 Am. & Eng. Ency. of Law, at page 122, where very many cases pro and con are cited, this principle is evolved from the weight of authorities: "It may be stated as a general rule that directors of an insolvent corporation cannot, as creditors of such

corporation, secure to themselves a preference. They must share ratably in the distribution of the company's assets." In 1 Beach Priv. Corp. § 2416: "The directors of a company stand in the same relation towards creditors of the corporation that they do to its shareholders, being trustees for the benefit of corporate trustees also." Mr. Justice Davis, in *Drury v. Cross*, 7 Wall. 299, speaking of the directors of a railroad company, says: "It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in receiving an advantage to themselves not common to the other creditors, they were guilty of a plain breach of trust." It is true "that a director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust,* executed to secure the payment of them, invalid." *Oil Co. v. Marbury*, 91 U. S. 587. And there would be nothing to hinder a director from loaning money and taking liens upon the corporate property as security for its repayment, and in enforcing its lien, provided it was an open and entirely fair transaction; but even then it would be looked upon with suspicion, and strict proof of its bona fides would be required.

There are many decisions, however, which hold that although directors are bound to discharge their duties prudently, diligently and faithfully, and apply the assets, in case of insolvency, for the benefit of creditors instead of stockholders, yet they are not technically trustees, nor bound to apply the assets ratably among the general creditors. These decisions hold that they may not only make a preference between creditors, but such preference may be made in their own favor if they be creditors, and in such cases they must act with the utmost good faith. 17 Am. & Eng. Ency. of Law, 122, note. This doctrine was held in *Garrett v. Plow Co.*, 70 Iowa, 697; 29 N. W. Rep. 366, and in a note to this case in 59 Am. Rep. at page 466, a great many cases are cited all holding the contrary doctrine to the case last named, and sustaining that to which we adhere; and although it appears, from an examination of some of the cases cited in the American and English Encyclopedia on this subject, that there are very respectable and high authorities which would seem to relieve directors

from the burden incident to their trust, we cannot hesitate to adopt the views which seem to us the most consistent with the virtuous exercise of the confidence reposed in them, and hold these fiduciaries to the duty which bids them put self-interest behind that of the creditors, who have not the same means of information, which might enable them to protect themselves. There are many cases cited in the brief of plaintiffs' counsel, and others found in the reports of the different states, which, for lack of decisions in North Carolina, are to us persuasive authority. The latest we have seen is that of the Supreme Court of Georgia in *Lowry Banking Co. v. Empire Lumber Co.*, 17 S. E. Rep. 968, where the proper distinction is made between a mortgage to a director of an insolvent corporation as an indemnity for liabilities already incurred, and one made in the execution or performance of an agreement or undertaking entered into at or prior to the time when the liability was incurred. It might be, in some instances, greatly to the benefit of the creditors and shareholders that directors should in good faith advance to the corporation funds upon security to enable it to carry out its undertakings.

To apply these principles to the case in hand. The defendant seems to be a corporation composed of but two persons or members, both of whom were necessarily officers and directors. The advantage to these persons in being erected into a corporation was most probably that they might thereby avoid, not to say evade, personal liability for the debts of the concern. It fails of success and becomes insolvent, which means that it owes more than its capital can pay. It holds a meeting in which, of course, both of its members participate, and by a unanimous vote it orders the one to confess judgment, in the name of the corporation, to the other for a large amount of money "due by note." Will this transaction stand to the detriment of the other creditors of the corporation? This is the first case of the kind which has come before this court for determination. It is an interesting and important question. By reason of the facility afforded by the statute for the formation of private corporations, much of the business of the country and of this state is now being transacted through such agencies. They offer many advantages to the stockholders, and in some respects they are fraught with danger to the public, unless they are held within the bounds of law and

equity. Here comes in the beneficence of that public policy which places all corporations under the visitation of the courts. Can there be any essential difference between the principle as applied to a confession of judgment under the Code and a mortgage? Most of the cases we have observed were those of mortgages to secure directors or other officers who were creditors of their own corporations. In the few cases which have come before this court under section 677 of the Code, notably in *Davidson v. Alexander*, 84 N. C. 621, it has been held that on account of its liability to abuse, and for the purpose of enabling other creditors to have the opportunity to make full investigation if they should so desire, the requirements of the statute should be strictly complied with. It will be observed that the case of *Sharp v. Railroad Co.*, 106 N. C. 308; 11 S. E. Rep. 530, was the confession of judgment by a corporation to one of its officers, and under circumstances calculated to excite inquiry, if not suspicion; but the appeal was from an order made upon a motion to vacate the judgment, where only matters of irregularity could be considered. To attack the same for fraud it was necessary to bring an independent action, as has been done in this case. The effect of a confession of judgment is more expeditious in securing a lien, and offers a more immediate means of securing payment of a debt by the issue of execution and sale of the corporate property, than that given by a mortgage, for a mortgage made by a corporation cannot create a preference over antecedent creditors until a reasonable time after registration, which is notice, has been afforded them to protect their rights. Code, §§ 685, 1255. The preference is attempted to be reached by the confession instead of by a mortgage. The preference in this case is to be avoided by whatever means it is sought. In holding that an insolvent corporation cannot prefer one of its directors, who is also a creditor, before other creditors, we are not at variance with the decision in *Blalock v. Manufacturing Co.*, 110 N. C. 99. The fourth headnote in that case is misleading when it says: "A corporation has the right to prefer a just debt to one of its officers, to those of other creditors." The judgment was that the debt of this officer should be postponed until the other creditors had been paid. The law is that, where a corporation is insolvent, its capital is a trust fund for the payment of its debts. A director,

creditor upon a debt theretofore existing, cannot take advantage of his superior means of information to secure his debt as against other creditors. Judgment affirmed.*

Insolvent corporations — whether directors may prefer themselves.— It seems manifest that the directors of an insolvent corporation, in the management or disposition of its assets, have no stronger claim to preference than other creditors. Those courts which hold that insolvent corporations cannot prefer any creditors, must, therefore, necessarily hold that they cannot prefer directors as creditors. On the other hand, if courts hold that, as a general rule, insolvent corporations may give preferences, the question arises whether any distinction should be made between directors and outside creditors. The general question of the right of insolvent corporations to give preferences has been considered in the note to the preceding case. Most of the cases cited in this note also discuss the same question.

The weight of authority is most decidedly in favor of the proposition that the directors of an insolvent corporation, who are also creditors thereof, cannot make use of their position to secure any advantage over other creditors. *Corey v. Wadsworth*, (Ala.) 11 South. Rep. 350; *San Francisco, etc., R. Co. v. Bee*, 48 Cal. 398; *Beach v. Miller*, 130 Ill. 162; 22 N. E. Rep. 464; *Rosebaum v. Whittaker*, 132 Ill. 32; 23 N. E. Rep. 339; *Hays v. Citizens' Bank*, (Kan.) 33 Pac. Rep. 318; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Hopkin's & Johnson's Appeal*, 90 Penn. St. 69; *Sicardi v. Keystone Oil Co.*, 149 Penn. St. 139; *Olney v. Conanicut Land Co.*, 16 R. I. 597; 18 Atl. Rep. 181; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Hutchinson v. Sutton Mfg. Co.*, 57 Fed. Rep. 998; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7; *Howe v. Sandford Fork & Tool Co.*, 44 Fed. Rep. 231; *Adams v. Milling Co.*, 35 Fed. Rep. 433; *White, etc., Mfg. Co. v. Potter Importing Co.*, 30 Fed. Rep. 864; *Lippincott v. Carriage Co.*, 25 Fed. Rep. 577, 586; *Stout v. Yaeger's Milling Co.*, 3 Fed. Rep. 802; *Corbett v. Woodward*, 5 Sawyer, 403; *Bradley v. Farwell*, 1 Holmes, 433; *Gaslight Improvement Co. v. Terrell*, L. R. (10 Eq.) 168. To these must be added the principal case.

In *Corey v. Wadsworth*, (Ala.) 11 South. Rep. 350, after an extensive review of authorities, it is said: "It will be seen that the modern authorities, almost without exception, utter the same strong condemnatory language of any and all attempts by directors of an insolvent corporation to have themselves indemnified and preferred over the other creditors of the company. The assets are, in a sense, a trust fund in their hands for the payment of the corporation's debts, and it is both their moral and legal duty to maintain perfect equality in their administration and disbursement, at least to the extent that they cannot prefer themselves. We need go no further in this case. In looking into the authorities it will be seen that the right of the directors of an insolvent corporation to prefer themselves as creditors is withheld from them, not alone on the ground that the assets are a trust fund, of which they are trustees for the creditors. Notice is taken of the superior knowledge they

* Reported in 18 S. E. Rep. 108.

necessarily have, and the great advantage this would and does give them in a race of diligence. But the principle extends further. In a conveyance in which they attempt to pay or secure themselves, that necessary element of all valid contracts—opposing interest in the seller and buyer—is wanting. They are both seller and buyer. Such transactions by a trustee are always voidable on the ground of public policy.”

Most of the cases proceed upon the principle that the directors of an insolvent corporation become trustees for its creditors, from which it follows that they must treat all alike and can give preferences to none. But it is pointed out by Judge Woods that this principle is not essential to the conclusion that directors may not give preferences to themselves. He says: “It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be, exclusive, knowledge of the corporate affairs into means of self protection to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests I think will compel its recognition and adoption. * * * Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth, and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization for the purpose, not only of escaping the ordinary risks of business done in the owner’s name, which may be legitimate enough, but of enabling the promoters and managers, when failure comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence.” *Howe v. Sandford Fork & Tool Co.*, 44 Fed. Rep. 231, 233.

In *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7, the foregoing language is quoted and approved. This case arose in Missouri, and it is therein further said: “When a corporation, in its business affairs, is thus in articulo mortis, whatever yet may be maintained on divided opinions as to its right to dispose of its property so as to give a preference to some general creditor, the law is too well settled, at least in this jurisdiction, to admit of extended discussion, that its directors cannot make a disposition of the assets so as to secure to themselves, directly or indirectly, a preference over general creditors. This is the rule in the Missouri courts. *Williams v. Jones*, 23 Mo. App. 132; *Mill Co. v. Kamp*, 38 Mo. App. 229; *Roan v. Winn*,

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93 Mo. 508; 4 S. W. Rep. 736." We have not examined these Missouri cases, and cannot say whether they support the rule or not.

The rule that directors of an insolvent corporation may give preferences to themselves is sustained by the following cases: *Garrett v. Plow Co.*, 70 Iowa, 697; 29 N. W. Rep. 395; *Buell v. Buckingham*, 16 Iowa, 284; *Smith v. Skeary*, 47 Conn. 47; *Burr's Exr. v. McDonald*, 3 Gratt. 216; *Bank v. Whittle*, 78 Va. 737; *Gordon v. Preston*, 1 Watts, 385; *Whitwell v. Warner*, 20 Vt. 425; *Gould v. Little Rock, etc., R. Co.*, 52 Fed. Rep. 680. The question is not argued to any extent except in the cases from Iowa and Virginia, which are the only courts that seem unequivocally committed to the doctrine. Other cases are sometimes cited as supporting the same view. Thus, in *Gould v. Little Rock, etc., R. Co.*, 52 Fed. Rep. 680, 685, after referring to the Iowa cases, it is said that the following cases are to the same effect: *Duncomb v. Railroad Co.*, 84 N. Y. 190; 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwold v. Hotel Co.*, 106 Ill. 439; *Stratten v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; 7 Atl. Rep. 514; *Ashhurst's Appeal*, 60 Penn. St. 314; *Sargent v. Webster*, 13 Met. 497; *Kitchen v. Railway Co.*, 69 Mo. 224; *Oil Co. v. Marbury*, 91 U. S. 587. But it will be found upon examination that these cases relate to transactions between the corporation and its directors where no question of insolvency or preference was involved.

As to what constitutes insolvency, within the meaning of the rule which forbids preferences, see the cases cited in note to preceding case and especially *Corey v. Wadsworth*, (Ala.) 11 South. Rep. 350, and *Sabin v. Columbia Riv. Lumber & Fuel Co.*, (Oreg.) 34 Pac. Rep. 612; 35 Pac. Rep. 854.

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(Supreme Court of South Dakota, November 24, 1893.)

1. CORPORATIONS. ESTOPPEL BY CONTRACT TO DENY CORPORATE EXISTENCE. A party who has contracted with a corporation de facto, as such, cannot be permitted, after receiving the benefits of his contract, to allege any defects in the organization of such corporation affecting its capacity to enforce such contract; but all such objections, if valid, are available only on behalf of the sovereign power of the state.

2. ORGANIZATION UNDER UNCONSTITUTIONAL LAW. ESTOPPEL OF STOCKHOLDER TO DENY INCORPORATION. Stockholders who subscribe for stock, or assist in organizing a corporation under a charter, and reap the benefits of the law, and thereby induce persons to credit the corporation, and do business with it on the faith of its being legally organized, will be estopped from alleging that the law under which the corporation is organized is unconstitutional as a means of avoiding any personal liability by reason of their transactions or contracts with such corporation.

A. E. Chamberlain (*Walter C. Farocett*, of counsel), for appellant. *C. E. Reed* and *Taubman & Potter*, for respondent.

BENNETT, P. J. This was an action brought by the respondent in the court below upon a contract for the payment of money, executed by the defendant, Albert E. Chamberlain, and to foreclose a mortgage upon real estate, which was given by him to secure the payment of said money.

The Building and Loan Association of Dakota is a corporation organized under the provisions of "An act to provide for the incorporation and regulation of building and loan associations," passed by the territorial legislature of Dakota, and approved March 13, 1885, and an act amendatory thereof, approved March 11, 1887. Said act, after prescribing the mode in which corporations may be organized as therein specified, provided, among other things, not material here: "Sec. 4. The money in the treasury, if equal to the amount of one share of stock in such association, shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan for the full amount of each share of stock held by such stockholder; provided that good and ample security shall be given by the borrower to secure the re-payment of the loan. Sec. 5. A borrower may repay a loan at any time by the payment to the corporation of the principal sum borrowed together with interest * * * not to exceed twelve per cent per annum; together with such per cent of premium per annum as may have been bid for the preference or priority of such loan. Or in case the amount of premium bid for the priority of such loan shall be deducted in advance, and the re-payment thereof is made before the expiration of the eight years after the organization of the corporation, there shall be refunded to such borrower one-eighth of the premium paid for every year of said eight years unexpired; provided, that when the stock is issued in separate series, the * * * time shall be computed from the date of the issuing of its shares of stock on which the loan is made. Sec. 6. No premium, fine or interest on such premiums that may accrue to the said corporation according to the provisions of this act shall be deemed usurious; and the same may be collected in this territory."

On the 1st day of March, 1889, the defendant, Albert E. Chamberlain, was a member of said association, and the owner and holder of sixteen shares of stock of said association; said

stock being issued in separate series; ten shares being dated March 1, 1889. On that day the plaintiff made a loan of \$1,600 to said defendant, Albert E. Chamberlain, the whole amount of premium bid therefor being deducted in advance, and for which defendant, Albert E. Chamberlain, on March 1, 1889, made, executed and delivered to the said plaintiff his promissory note, in writing, and said note so executed and delivered is in words and figures following to-wit: "\$1,600.00. Aberdeen, Dakota, March 1st, 1889. For value received, after three years from date, and before nine years from date, I promise to pay to the order of the Building and Loan Association of Dakota, at its home office in Aberdeen, Dakota, the sum of sixteen hundred dollars, with interest at the rate of six per cent per annum on the sum of seven hundred eighty-four dollars payable monthly in advance. It is understood that this note is given for a loan obtained on sixteen shares of stock of said Building and Loan Association of Dakota, and if the maker hereof fails to make any monthly payment on said stock, or to pay any installment of interest for a period of six months after the same is due, then the whole amount of this note shall become due and payable at once. But if the maker hereof shall pay all installments of interest which become due hereon, and all fines and monthly payments which become due on said stock, until said stock becomes fully paid in, and of the value of \$100 per share, and before any of said installments of interest or monthly payments shall have been past due for a period of six months, then, upon the surrender of said stock to said association, this note shall be deemed to be fully paid and canceled. This note is understood to be made with reference to, and under the laws of, the territory of Dakota. All payments hereon payable at the office of the association in Aberdeen, Dakota. Albert E. Chamberlain. [Margin]: If this note is paid before eight years from date, there shall be allowed such rebate from the amount of the premium as the board of directors of said association shall deem equitable. Premium, \$816; loan, \$1,600."

To secure the payment of said note, interest thereon, and loan, and also to secure the payment of the monthly dues upon said stock, the fines for failure to pay said monthly dues, and the fines

for failure to pay the interest payments when due, the said defendant, Albert E. Chamberlain, did, on the 1st day of March, 1889, execute and deliver to the plaintiff a mortgage deed, and thereby convey to the plaintiff certain real property, which was described therein, which mortgage deed "provided, further, in case of default in the payment of the principal, when due, or of interest, or of any part thereof, or if the taxes or premiums on insurance on the property hereby mortgaged be due and unpaid for the space of six months, or should said sixteen shares of stock, as above recited and mentioned, or any part thereof, be sold or forfeited for the non-payment of dues, fines or penalties, as provided in the by-laws of said second party, then, and in either of said cases, the whole principal debt aforesaid shall immediately become due, payable and recoverable, and the said party of the first part, in such case, does hereby authorize and empower the said party of the second part, its successors or assigns, to sell the hereby granted premises at public auction or otherwise, and convey the same to the purchaser in fee simple, agreeable to the statute in such case made and provided, or which may hereafter be in force, and, out of the moneys arising from such sale, to retain the principal and interest, as well as any fines or penalties which shall then be due on said obligation, and as provided by the by-laws of said association, together with all the costs and charges of foreclosure. * * *

The by-laws of said association in force at the time of the contract provide that "any member who shall neglect or refuse to pay his or her monthly dues of sixty cents per share on the day the same shall become due, shall pay a fine of ten cents per share upon each share of stock, payable monthly, for every month a monthly payment shall be allowed to run past due." "For each day an interest payment shall be allowed to run unpaid after it becomes due, there shall be the sum of five cents per day paid the association upon each one hundred dollars of loan for which such interest payment is contracted."

The defendant, Albert E. Chamberlain, did not pay the installments due on the sixteen shares of stock for several months in 1890 and 1891, nor did he pay the interest due on the note secured by the mortgage, and by reason of said default the entire principal sum and interest became due; also a fine of ten cents per

share for each month in which a default was had, and a penalty of five cents per day on each \$100 for the time of the continuation of the default, became due and payable as provided by the by-laws of said association. For these various sums the plaintiff asked judgment and sale of the sixteen shares of the stock and for a foreclosure of the mortgage given to secure them.

To the complaint of the respondent the defendant, Albert E. Chamberlain, demurred upon the following grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the plaintiff has not capacity to sue; which demurrer was overruled, and from this order an appeal was duly taken and perfected.

The only ground in this appeal upon which the defendant, Albert E. Chamberlain, seeks to be released from the obligations created by the contract and mortgage executed by himself and wife is, that the plaintiff has no valid existence, and is, therefore, incapable of maintaining an action to enforce this or any other contract. In support of this contention he insists that the acts of the territorial legislature of 1885 and 1887, under which said association was organized, were enacted without authority, and are unconstitutional and void. On this point it is sufficient to say that whatever may be the fact in relation to the valid legal existence of said association as a corporation, the defendant Chamberlain is not in a position to challenge its validity. The complaint shows that he was a stockholder in it, and, as such, he contracted with it, borrowing and receiving money of it, and endeavored to and did receive benefits from it, under the rules and regulations, it is presumed, he helped to make. The rule is well established that a party who has contracted with a corporation de facto, as such, cannot be permitted, after receiving the benefits of his contract, to allege any defects in the organization of such corporation affecting its capacity to enforce such contract; but all such objections, if valid, are available only on behalf of the sovereign power of the state. On this proposition see 2 Mor. Corp. § 750, and authorities cited in note. This rule applies also where the corporation is organized under a law alleged to be unconstitutional. 2 Mor. Corp. § 759; *Freeland v. Insurance Co.*, 94 Penn. St. 504; *McCarthy v. Lavasche*, 89 Ill. 270; *Dows v. Naper*, 94 Ill. 44; *St. Louis v. Shields*, 62 Mo. 247; *Wright v. Lee*, (S. D.)

51 N. W. Rep. 706 ; Wentz v. Lowe, (Penn. Sup.) 3 Atl. Rep. 878 ; Smith v. Sheeley, 12 Wall. 358 ; Irrigation Co. v. Warner, 72 Cal. 379 ; 14 Pac. Rep. 37. It is true that a corporation formed in violation of a prohibition of the organic law of a territory, or the Constitution of a state, like a corporation formed in violation of a prohibitory act of the legislature, will not, as a rule, be recognized by the courts, for the purpose of suing and enforcing rights founded on such illegal incorporation. There is, however, a difference between a constitutional prohibition designed to prevent the formation of corporations of a certain class, or for certain purposes, and a provision whose sole object is to limit the power of the legislature to pass general or special incorporation laws. An act of incorporation passed by the legislature in violation of a provision of the latter description would undoubtedly be void, and no right or authority could be derived from it ; but, if persons should actually form a corporation under the provisions of such void act, they would not thereby violate the constitutional prohibition. Morawetz, in his *Law of Private Corporations* (§ 759), says : " The formation of the corporation, under these circumstances, would merely be contrary to the general common-law prohibition, as in any other case where a corporation is formed without the consent of the sovereign. The legal status of a corporation formed under an unconstitutional law, as that of a corporation formed under no law at all, or without complying with such laws as may exist, both with regard to the rights and obligations of its members, and the rights and obligations of the corporation in respect to parties dealing with it, should, therefore, be the same." Accordingly, it was held by the Supreme Court of Pennsylvania, in an action brought by a mutual insurance company against a policyholder, that the defendant could not, after acting as a shareholder, avoid his agreement on the ground that the corporation was incorporated under an unconstitutional law. *Freeland v. Insurance Co.*, 94 Penn. St. 504. See, also, *McClinch v. Sturgis*, 72 Maine, 288.

The case of *McCarthy v. Lavasche*, 89 Ill. 270, was a suit brought by a creditor of a corporation to enforce the individual liability of a shareholder for double the amount of his shares. The defense was interposed that the act of the legislature under which the corporation was formed was unconstitutional. The

Supreme Court, however, held that the defendant was liable. Justice Walker, in delivering the opinion of the court, said: "It is urged that the corporation was never legally organized, as the act under which the stockholders incorporated was unconstitutional and void; that if not, then the clause in the charter rendering stockholders liable is too vague to render them liable to the individual creditors of the company; or, if it shall be held that they are so liable, then the remedy is in equity, against all the stockholders. On the other hand, it is contended that the law does not contravene the Constitution; but if it should be so held, the stockholders having organized the corporation, and held themselves out to the world as such, and thereby obtained credit and incurred indebtedness, they are estopped to deny the validity of the act, or their organization under it; and that a reasonable and fair construction of the clause of the act quoted renders the shareholders individually liable to each and every creditor, and that the remedy for a recovery on the liability is complete at law. These are the questions raised and discussed on this record. Even if the law is unconstitutional, can the promoters and those engaged in its operation be heard to say that they may relieve themselves from liability, and from all their engagements, because the law under which they have acted is prohibited by the organic law? May shrewd, intelligent persons go to the general assembly and procure an act that they should know is prohibited by the fundamental law, avail themselves of its benefits, obtain the money of the uninformed and the confiding, and then be heard to say, we are not incorporated; our charter and organization are void, and we will hold your money? Or, may those who promoted the enterprise, by becoming shareholders, to enable the company to organize, and to procure other people's money, be heard to interpose such a defense? The presumption is, that each subscriber for stock knew at the time of subscription that the charter contained the provision rendering him liable for double the sum he subscribed; and such persons could not but have known that this provision would contribute largely to give credit to the concern, and greatly augment its business. The subscribers for shares of the stock, no doubt, expected to reap large profits, and expected those profits to be greatly enhanced by this provision. It enabled them to point to it, and assure individuals and the public that the

institution was safe, as, if the business was not lucrative, all the stockholders were severally liable for double the amount of their subscriptions. They thus, no doubt, did increase their business, and thus obtained money and credit, which now, when the institution has proved a failure, they endeavor to avoid paying by urging that their organization, and, consequently, their subscriptions to its stock, were void. Fair dealing would say that they should be estopped from interposing such a defense. * * * Here, appellant approved of the act, and availed himself of its benefits by subscribing for stock and becoming entitled to exercise all the rights and privileges of a stockholder in the corporation. Justice, morality, public policy and precedent all demand that appellant should be estopped from denying the constitutionality of the law. If stockholders might show the law unconstitutional, and their organization void, and all their acts unauthorized, then all persons engaged in the organization of the corporation should be held liable for the consequences of their illegal and unauthorized acts, independent of the clause in their charter. So they should, in no event, escape liability for obtaining money without authority."

The rule in Michigan appears to be different, and, when a corporation is organized under a void act of the legislature, the courts will not recognize the corporation for the purpose of enforcing a contract made by or with it. The cases which have been decided by the Supreme Court of that state in which the question arose, viz.: *State v. How*, 1 Mich. 512; *Green v. Graves*, 1 Doug. (Mich.) 351; *Hurlbut v. Britain*, 2 Doug. (Mich.) 191; *Burton v. Schiïdbach*, 45 Mich. 504; 8 N. W. Rep. 497; *Mok v. Association*, 30 Mich. 511, were cases where the corporations appeared to have been formed for illegal purposes, namely, to violate laws against unauthorized banking, as well as without constitutional legislative authority. But that court seems to have receded somewhat from this position in the later case of *Manufacturing Co. v. Runnells*, 55 Mich. 130; 20 N. W. Rep. 823. This was an action to recover the possession of certain real estate. Upon the trial of the case the plaintiff offered in evidence a sheriff's certificate of sale of the real estate, made by virtue of an execution issued upon a judgment rendered in favor of the plaintiff corporation. To the introduction of this the defendant objected for

the reason that the grantee named in the certificate is a corporation, and cannot hold real estate by its articles of incorporation, or under the laws of that state. The Circuit Court trying the case overruled the objection. Upon appeal the Supreme Court says: "In this case the defendant introduced in evidence the execution upon which the sale was made. From this it appears that it was issued upon a judgment rendered for damages for the non-performance of certain promises and undertakings made by the defendant to the Estey Manufacturing Company, which shows that the defendant had had dealings with the plaintiff as a corporation, in the name it assumed. It was, therefore, estopped, not only by having dealt with it as a corporation, but by the judgment in the case, to deny its corporate existence."

So far as this question arises in our jurisdiction, it is well settled by section 2892 of the Compiled Laws, which is as follows: "The due incorporation of any company, claiming in good faith to be a corporation under this chapter and doing business as such, or its right to exercise corporate powers shall not be inquired into collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had and action brought, at the suit of the territory, in the manner prescribed in the Code of Civil Procedure."

This seems, therefore, to be the well-established doctrine throughout American jurisprudence. Any other doctrine would be contrary to the plainest principles of reason and good faith, and involves a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have helped to make appear to exist, and upon which others have relied. Therefore, we are of the opinion that the court below committed no error in overruling the demurrer upon this ground, and the order of the court below is affirmed. All the judges concur.*

1. Estoppel by contract to deny incorporation.—A fire insurance company which contracts with and receives money from certain persons acting as a corporation under an invalid charter granted under a general law, but acting within both charter and general law, cannot, after the property insured has been burned, and its time to pay has come, avoid payment by denying the corporate existence of the insured. *Bon Aqua Improvement Co. v. Standard*

* Reported in 56 N. W. Rep. 897.

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Fire Ins. Co., 34 W. Va. 764; 12 S. E. Rep. 771. A stockholder cannot, to escape liability as such, contend that the corporation was not legally incorporated, and that since it was without power to issue stock, he never became a stockholder. *National Commercial Bank v. McDonell*, 92 Ala. 387; 9 South. Rep. 149. One who has recognized a corporation by suing it in its corporate name, cannot, in the same proceeding, be heard to deny its corporate existence. *Lester v. Georgia, etc., R. Co.*, 90 Ga. 802; 17 S. E. Rep. 113.

The subject of estoppel to deny corporate existence is treated at length in note to *Vanneman v. Young*, 3 Am. R. R. & Corp. Rep. 660, 671. As to whether the rule of estoppel in such cases precludes setting up that the corporation is organized under an unconstitutional statute, see 3 Am. R. R. & Corp. Rep. 676, 677. See, also, on the general subject, *Snider's Sons Co. v. Troy*, 4 Am. R. R. & Corp. Rep. 25; 5 Am. R. R. & Corp. Rep. 352, note; *Corey v. Lee*, 93 Ala. 468; 8 South. Rep. 694.

2. Pleading and proof of incorporation.— See generally, 3 Am. R. R. & Corp. Rep. 678-680. In a suit against a private corporation the complaint is fatally defective unless it contains an unequivocal averment that it is a corporation. Without this averment the complaint does not state facts sufficient to constitute a cause of action, and this defect is never waived. *Miller v. Pine Mining Co.*, 2 Idaho, 1206; 31 Pac. Rep. 803.

In an action by a national bank, plaintiff may prove that it is a corporation de facto by parol evidence that it is carrying on a general banking business as a national bank, authorized by the general laws of the United States, under the name by which it has sued, the court taking judicial notice of such laws. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348; 33 Pac. Rep. 834. Howard's Michigan Statutes, section 8140, provide that, in suits by domestic corporations, no proof of incorporation shall be necessary, unless defendant shall plead nul tiel corporation. Section 7528 provides that in any suit where it is necessary to prove the incorporation of a company, evidence that such corporation is doing business under a certain name shall be prima facie evidence of its due incorporation. Held, that, notwithstanding the plea of nul tiel corporation, plaintiff had a right to make a prima facie case by showing that it was doing business under the name assumed by it, and had been for more than seven years, which conclusively established the fact of due incorporation, in the absence of testimony to contradict it. *Canal St. Gravel-road Co. v. Paas*, 95 Mich. 372; 54 N. W. Rep. 907. In an action by a gravel-road company to enforce the statutory penalty for forcibly and illegally passing its tollgate, defendant cannot question the validity of plaintiff's corporate existence. *Ibid.*

When the answer denying the allegations of corporate existence is verified it must be proved upon the trial; and it is error, with such an answer in the case, to render judgment against a corporation without any proof of its corporate existence. *Jones v. Ross*, 48 Kan. 474; 29 Pac. Rep. 680.

CHICAGO, M. & ST. P. RY. CO. ET AL. v. DARKE.

CHICAGO, E. & L. S. RY. CO. ET AL. v. SAME.

(Supreme Court of Illinois, November 29, 1898.)

1. EMINENT DOMAIN. JOINT LIABILITY OF LESSOR AND LESSEE RAILROAD COMPANIES FOR INJURY TO LAND. Where the lessor and lessee of a railroad are jointly sued for injury to property caused by its operation, the objection that the two defendants are not jointly liable cannot be raised in the Supreme Court when it was not raised in the lower court by exception to an instruction or ruling on evidence, or stated as a ground for new trial, since in such case the matter of joint liability is treated as a question of fact.

2. LIABILITY FOR DAMAGE TO PROPERTY CAUSED BY THE NOISE AND CONFUSION OF TRAINS AND ENGINES. The owner of land in the vicinity of a railroad may recover for injury to his property caused by the noise, confusion and disturbance arising from the passage of trains and from engines in its yards.

Edwin Walker, for appellants. *Ela, Grover & Graves*, for appellee.

BAILEY, J. This is an action on the case, brought by Mary E. Darke against the Chicago, Milwaukee and St. Paul Railway Company and the Chicago, Evanston and Lake Superior Railway Company, to recover damages to certain real property of the plaintiff, caused by the construction, maintenance and operation of a line of railway near the same. The plaintiff, as it appears, at and prior to the construction of the railway was the owner in fee of two lots on the west side of Chicago avenue, in the village of South Evanston, having a frontage on the avenue of 100 feet, each lot having thereon a dwelling house, and being used solely as residence property, the entire property being worth from \$12,000 to \$15,000. In the year 1885 the line of railway in question was built on the opposite side of and adjoining the avenue, so as to leave only the width of the avenue, which was about seventy-five feet between the railway and the plaintiff's property. The declaration alleges, among other things, in substance, that prior to the building of the railway the atmosphere upon and about the plaintiff's premises was pure and free from noxious vapors, smoke and other unhealthful and injurious substances, and her premises were free from the injurious effects,

damages and nuisances complained of, but that the defendants wrongfully and injuriously entered upon the land in front of the plaintiff's premises, and constructed and have maintained thereon their railway, with divers tracks, side tracks and switches, and have operated the same by running thereon divers steam locomotive engines and trains of cars, the number of trains daily being, to wit, fifty; and that the defendants, in operating their railway and permitting it to be operated, have unlawfully, unjustly and injuriously permitted to be thrown and deposited in and upon the plaintiff's premises divers large quantities of smoke, cinders, dust, soot, ashes, sparks of fire, and other noxious and injurious substances, and that by reason of the operation of the railway opposite the plaintiff's property the soil of the plaintiff's premises has been and is greatly shaken, disturbed, vibrated and damaged. Also that the railway has been constructed and operated in such close proximity to the plaintiff's property that necessarily, by reason of such operation in the ordinary and usual way of operating steam railways, there have been constantly, day and night, cast, thrown and deposited from the defendant's engines and cars, upon the plaintiff's property, large quantities of smoke, cinders, ashes, soot, dust, and other noxious vapors and substances, which cause and have caused great damages to the plaintiff's property. A second count also alleges that the defendants have allowed and permitted locomotive engines to remain standing, and to run backward and forward, in front of the plaintiff's premises, with great noise, caused by escaping steam, the ringing of bells, and otherwise.

It appears that the railway at the point in question was built with two main tracks and several side tracks and switches, and that nearly opposite the plaintiff's property were erected an engine house and a water tank with a stationary engine; and the evidence tends to show that the side tracks in that vicinity were used to a great extent for standing locomotive engines thereon when not in use on the road, and that the fire and ashes were removed therefrom at that point, and deposited on the ground, and the fires again started when the engines were about to be used. Evidence was also introduced tending to show that when the wind was in the proper direction, smoke, ashes and cinders to a considerable amount were blown from the railway onto the plaintiff's premises, and that the value of her premises was depre-

ciated from that cause, as well as from the noises produced by the engines and cars on the railway, and also by reason of the unsightly nature of the railway structures. Witnesses were produced who testified as to the amount of the damages to the plaintiff's property thus occasioned, their estimates including all these elements of damage, but generally specifying the proportion of the damages testified to by them arising from each of these causes. The jury found the issues for the plaintiff, and assessed her damages at \$3,800, and judgment was rendered in her favor for that sum and costs. That judgment, on appeal to the Appellate Court, was affirmed, and this appeal is from the judgment of affirmance.

The point was made in the Appellate Court, and is renewed here, that the two railway companies sued are not jointly liable, and that a joint verdict and judgment against them are, therefore, erroneous. The contention is that the railway in question was constructed and put in operation in the year 1885 by the Chicago, Evanston and Lake Superior Railway Company, and was operated by that company until December, 1887, when it was leased to the Chicago, Milwaukee and St. Paul Railway Company, and has since that time been operated exclusively by the latter company. It is claimed that all damages to the plaintiff's property resulting from its construction and operation then accrued, and can be recovered only from the company then owning and operating the road. It is sufficient to say that all questions of fact being conclusively settled by the judgment of the Appellate Court, and the question of the joint liability of the two railway companies having been in no way raised in the trial court as a question of law, it is not so presented by the record as to be reviewable in this court. It was not raised at the trial by exception to any ruling of the court in relation to the exclusion or admission of evidence, by any instruction to the jury, either given or asked, or by any point made in the defendant's motion for a new trial. If litigated at all in the trial court — of which there is no evidence — it was submitted to the jury as a mere question of fact, and, its decision being adverse to the defendants, they are now concluded.

Complaint is made of the refusal of the court to give to the jury the following instruction asked by the defendants: "The

court further instructs you that the plaintiff cannot recover in this action any damages to her property alleged to have been caused by reason of any noise, confusion or disturbance occasioned by the operation of the defendant's trains in the yards or upon the tracks of the defendants, or for unsightly structures on the defendants' premises in front of the plaintiff's property." In considering the propriety of this instruction it will be unnecessary for us to determine whether the plaintiff could be entitled, in any event, to recover damages to her property, caused by the erection and maintenance of unsightly structures on the defendants' right of way in front of her premises, since, if the instruction was erroneous in holding that she could not recover damages caused by any noise, confusion or disturbance occasioned by the operation of the defendants' trains, it was properly refused. It cannot be denied that the decisions of the courts upon the question whether, in estimating damages to property not taken, the noise, confusion and disturbance caused by the engines and cars used in the operation of the railway can be considered, are somewhat conflicting. Lewis Em. Dom. § 493. Some of the decisions seem to hold that the employment of locomotive engines, the running of trains and the noise and confusion thus caused are the necessary and lawful incidents of the operation of railways, and, therefore, that damages to lands abutting upon or near the railway thereby caused are *damnum absque injuria*, and are, therefore, incapable of affording any ground for the recovery of damages. But we are not prepared to coincide with that view. It cannot be doubted that at common law mere noise in the immediate vicinity of the premises, and especially of the dwelling house of a landowner, may be of such character as to constitute an actionable nuisance, remediable by an action on the case for damages or by injunction. *Crump v. Lambert*, L. R. (3 Eq.) 409; *Broder v. Saillard*, 2 Ch. Div. 692; *Davis v. Sawyer*, 133 Mass. 289; *Bishop v. Banks*, 33 Conn. 118; *Fish v. Dodge*, 4 Denio, 311; Bisp. Eq. (5th ed.) § 441; *Wood Nuis.* chap. 18. The railway having been built and being operated by authority of law, its operation of course cannot be held to be, in law, a nuisance; but, while that is so, it is difficult to see how the damages resulting to adjacent property from its operation are in any degree affected by that circumstance. If the noise, confusion and dis-

turbance caused by the defendants' engines and cars is such as would, in the absence of legislative authority, have constituted an actionable nuisance, the existence of such authority in no way relieves them of their damaging effect, so as to take away from property owners their right to redress, or so as to convert what was before actionable into a case of *damnum absque injuria*. The Constitution gives to every property owner whose property is damaged for a public use the right to compensation, and, while he cannot sue as for a nuisance where his property has been damaged by a public improvement erected and maintained in pursuance of law, his right to compensation remains and may be enforced by any appropriate remedy. Sutherland, in his *Treatise on the Law of Damages*, in discussing the rule of compensation for damages to property not taken in the construction and operation of a railroad, says that the jury "may consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, or from smoke, so far as they severally arise from the use of the strip of ground taken, excluding all common and indirect damages; that is, such damages as affect the owner in common with all other members of the community." 3 *Suth. Dam.* 437. The same rule is recognized in *Railroad Co. v. Eddins*, 60 *Tex.* 656; *Railroad Co. v. Steiner*, 44 *Ga.* 546. But it is urged that the contrary rule was adopted by this court in *Railroad Co. v. Hall*, 90 *Ill.* 42. One expression seems to have been used in the opinion in that case, to the effect that the noise and confusion in the vicinity of the railroad could not be considered in the estimate of damages. On examining the report of the case, however, it will readily be seen that no such question was involved in the case. No damages by reason of the noise and confusion caused by the operation of the railroad were claimed in the pleadings, nor, so far as appears, was any evidence on that subject offered, nor any claim made to damages arising from that cause. The subject seems to have been referred to in the opinion merely by way of argument or illustration, and cannot be treated as a decision of the question, as no such question was before the court for decision. But the precise question now under consideration was before this court in *Railway Co. v. Nix*, 137 *Ill.* 141; 27 *N. E. Rep.* 81, which was a proceeding by the railway company under the Eminent Domain Law. The following instruction

was asked by the railway company, and refused: "You are instructed that in this proceeding you cannot allow any damages on account of the noise made by passing trains." In holding that this instruction was properly refused he said: "The noise made by passing trains is a necessary incident to the proper operation of a railway; and, in so far as such noise will have a tendency to render the farm less desirable as a place of residence, and, therefore, less valuable in the market, it was an element of damage which the jury might properly take into consideration." See, also, *Railroad Co. v. Scott*, 132 Ill. 429; 24 N. E. Rep. 78. We are of the opinion, then, that the instruction asked in this case was properly refused. Other points are made which we have duly considered, but we do not regard any of them as calling for further discussion. We find no error in the record, and the judgment of the Appellate Court will, therefore, be affirmed.*

Eminent domain — damages to property by noise, smoke, vibration, etc., when no part taken.— Laws 1878, chapter 386, empowered the authorities of the city of New York to lay pipes and erect structures necessary to extend the distribution of water throughout the city at higher levels, but did not designate the location of the necessary pumping station. Held, that the city is liable for injury to private property adjacent to such pumping station caused by noise and vibration. *Morton v. City of New York*, 140 N. Y. 207; 35 N. E. Rep. 490. Damages can be recovered for injuries sustained from the existence and operation of a railway, switches and coal bins across the street from plaintiff's lot, although they do not occupy the street upon which the lot abuts, nor disturb ingress and egress to and from the same. *Ft. Worth R. G. R. Co.*, 82 Tex. 383; 17 S. W. Rep. 620. The same view is supported by *Chicago & G. W. R. Co.*, 144 Ill. 9; 32 N. E. Rep. 547.

The owner of a lot which is several hundred feet from the line of a railroad cannot recover damages for the annoyance caused by the smoke, dust and noise of passing trains. *Railroad Co. v. Lippincott*, 9 Atl. Rep. 871; 116 Penn. St. 472; *Railroad Co. v. Marchant*, 13 Atl. Rep. 690; 119 Penn. St. 541, followed. *Pennsylvania Co. for Insurance, etc., v. Pennsylvania S. V. R. Co.*, 151 Penn. St. 334; 25 Atl. Rep. 107.

On the subject generally, see *Gainesville, etc., R. Co. v. Hall*, 3 Am. R. R. & Corp. Rep. 251 and note; *Omaha, etc., R. Co. v. Jaucete*, 3 Am. R. R. & Corp. Rep. 268 and note; *Bohan v. Port Jervis Gas-Light Co.*, 3 Am. R. R. & Corp. Rep. 318; *American Bank Note Co. v. New York El. R. Co.*, 5 Am. R. R. & Corp. Rep. 583; *Jones v. Erie & W. V. R. Co.*, 6 Am. R. R. & Corp. Rep. 563.

* Reported in 35 N. E. Rep. 750.

NIMS v. MT. HERMON BOYS' SCHOOL.

(Supreme Judicial Court of Massachusetts, November 29, 1898.)

1. CORPORATION. LIABILITY FOR NEGLIGENCE IN UNDERTAKINGS WHICH ARE ULTRA VIRES. Though the maintenance of a ferry by an educational corporation is ultra vires, such corporation is liable for injuries to a passenger being transported thereon for hire, caused by the negligence of the employee in charge.

2. RATIFICATION OF UNAUTHORIZED ACTS. Where a corporation, acting through its managing officers, knowing that a business outside its charter powers had been undertaken by persons assuming to act as agents in so doing; that the income of the business had been received, and the expenses of it paid by the treasurer, in his official capacity, and that the balance of the receipts was in its treasury — adopted the action of its treasurer, and elected to keep the money, it is proper for the jury to find a ratification of the unauthorized acts.

3. Ratification of an unauthorized act will make the principal liable for an injury resulting from the negligence of the agent in doing the act.

Conant & Conant, for appellant. *Dana Malone*, for appellee.

KNOWLTON, J. The defendant is an educational corporation. The plaintiff seeks to recover damages for injuries received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges, the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant, the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds. It says, in the first place, that if it maintained the ferry, and hired and paid the ferryman, the business was ultra vires, and, therefore, it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferryboat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts, as natural persons are. It is no defense to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel, and for malicious prosecution, as well as for

torts resulting from negligent management of the corporate business. *Moore v. Railroad Co.*, 4 Gray, 465; *Fogg v. Railroad Corp.*, 148 Mass. 513; 20 N. E. Rep. 109; *Reed v. Bank*, 130 Mass. 443; *Railroad Co. v. Quigley*, 21 How. 209; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Bank v. Graham*, 100 U. S. 699; *Gruber v. Railroad Co.*, 92 N. C. 1; *Hussey v. Railroad Co.*, 98 N. C. 34; 3 S. E. Rep. 923. If a corporation, by its officers or agents, unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is ultra vires. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferryboat is that the contract to carry the plaintiff was ultra vires, and, therefore, invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

In *Bissell v. Railroad Co.*, 22 N. Y. 258, the plaintiff founded his action on the negligence of the two defendants while jointly running cars on a railroad in a state to which the charter of neither of them extended, and it was conceded that the defendants were acting ultra vires. The plaintiff recovered, Comstock, Ch. J., holding, in an elaborate opinion, that the corporations were liable under their contract, notwithstanding that the contract was ultra vires, and that if they could not be held under their contract they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract called for. Selden, J., in an equally full and elaborate opinion, held that the contract for carriage was invalid, and that there could be no recovery under it, nor for negligence founded upon it, but it was his opinion that if the contract were set aside the defendants owed the plaintiff a duty founded on his relation to them as an occupant, with their permission, of a place in their car, and that the improper management of the car was a neglect of that duty, for which the plaintiff could recover. Clerke, J., agreed with this view, and all but one of the other judges con-

curred in a decision for the plaintiff, without stating the ground on which they thought the decision should be placed. This case was followed in *Buffett v. Railroad Co.*, 40 N. Y. 168, in which it was held that a railroad corporation was liable for negligence of the driver of a stagecoach which it was running without a legal right to do a business of that kind; but the opinion does not show whether the decision is founded on the opinion of Comstock, Ch. J., given in the former case, or on that of Selden, J. Like decisions have been made under similar facts in *Banking Co. v. Smith*, 76 Ala. 572; *Railroad Co. v. Haring*, 47 N. J. Law, 137; and *Hutchinson v. Railroad Co.*, 6 Heisk. 634.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it either expressly or by implication, is invalid, considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work. *Davis v. Railroad Co.*, 131 Mass. 258; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; *Thomas v. Railroad Co.*, 101 U. S. 71; *Leslie v. Lorillard*, 110 N. Y. 519; 18 N. E. Rep. 363; *Linkauf v. Lombard*, 137 N. Y. 417; 33 N. E. Rep. 472; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 803. On the other hand, courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract, and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail, when to allow it would work injustice, and accomplish legal wrong. *Leslie v. Lorillard*, 110 N. Y. 519; 18 N. E. Rep. 363; *Linkauf v. Lombard*, 137 N. Y. 417-423; 33 N. E. Rep. 472. Many cases

might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them, and leave the other party without remedy, as he might do in a supposable case, where another had put himself at a disadvantage on the faith of a contract with him to commit a crime. Whether, in this commonwealth, a contract entered into by a corporation *ultra vires*, and partly performed, will ever be enforced on equitable grounds we need not now decide. See *Woolen Co. v. Lamb*, 143 Mass. 420; 9 N. E. Rep. 823; *Bank v. Butler*, 157 Mass. 548; 32 N. E. Rep. 909; *Bank v. Porter*, 125 Mass. 333; *Bank v. Rogers*, 125 Mass. 339; *Bank v. Savery*, 127 Mass. 75-77; *Bank v. Matthews*, 98 U. S. 621; *McCluer v. Railroad Co.*, 13 Gray, 124; *Bank v. Whitney*, 103 U. S. 99; *Parish v. Wheeler*, 22 N. Y. 494; *Oil Creek, etc., R. Co. v. Pennsylvania Transp. Co.*, 83 Penn. St. 160; *Bradley v. Ballard*, 55 Ill. 413. In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts and do anything else incidental to the maintenance of the school. Doubtless, some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires*, but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant, while running the ferryboat, accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee; it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the

county commissioners under Public Statutes, chapter 55, section 1. to keep the ferry ; but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given to the county of Franklin, with the condition to properly perform the duty of a ferryman, executed in behalf of the defendant by one who was designated as superintendent and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above the mortgage existing upon it, and that he and the defendant's superintendent, who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry, above his wages, to the defendant's cashier and paymaster. For the month of April, Deane was paid for his services by the defendant's paymaster, out of the defendant's funds. In June, 1890, a new ferryboat was constructed, under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York, monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustee of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be made by a man in his employment. This report was accepted by the trustees, and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title, "Ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it. There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it.

The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those assumed to act as its agents in doing it, and that the income of the business had been received, and the expenses of it paid, by its treasurer, in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury, on all the evidence. If there was such a ratification, it carried with it the consequences which would have followed an original authority. In *Dempsey v. Chambers*, 154 Mass. 330; 28 N. E. Rep. 279, it was held, after much consideration, that ratification of an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in doing the act. We are of opinion that the case should have been submitted to the jury. Exceptions sustained.*

Corporations — liability for ultra vires acts.— Mr. Beach says that "the general doctrine is now held that a corporation is liable for the negligence and other torts of its agents and servants even when relating to and connected with acts of the corporation that are ultra vires." 2 Beach Priv. Corp. § 428. In *National Bank v. Graham*, 100 U. S. 699, 702, it is said: "Corporations are liable for every wrong they commit, and in such cases the doctrine of ultra vires has no application." For numerous authorities in support of these views see 2 Mor. Corp. §§ 725-727.

* Reported in 35 N. E. Rep. 776.

LEWIS, MAYOR, ET AL. v. DENVER CITY WATER WORKS Co.

(Supreme Court of Colorado, December 4, 1898.)

1. MUNICIPAL CORPORATIONS. POWER OF COURT TO ENJOIN LEGISLATIVE ACTION BY It is a general principle in our governmental system that the judicial department has no direct control over the legislative department, and this principle extends to the local legislative bodies of municipal corporations.

2. A city council or board of trustees of an incorporated town, when acting, or proposing to act, in a legislative capacity upon a subject within the scope of its powers, as conferred by its charter or by the general laws of the state, is entitled to immunity from judicial interference.

3. ENJOINING PASSAGE OF ORDINANCE. The passage of an ordinance, granting to a company a right to construct and operate water works in a town, will not be enjoined on the ground that such an act would violate the exclusive rights conferred upon another company by a previous contract.

ACTION by an incorporated water company to enjoin the mayor and trustees of an incorporated town from passing any resolution or ordinance in conflict with a certain contract between the plaintiff and said municipality. A preliminary injunction was granted as prayed for, and on final hearing the same was continued during the existence of said contract. The defendants appeal.

The printed brief filed in this court by counsel for the water company contains a statement of the controversy, as follows: "This action arose by reason of the fact that the board of trustees of the town of Highlands threatened to pass, and were about to pass, an ordinance granting to the Citizens' Water Company the right to construct and operate water works in the town of Highlands, in direct violation of the exclusive grant theretofore made to the Beaver Brook Water Company with reference to that matter, and it is an action brought to enjoin the board of trustees from passing such ordinance, or granting such rights to the Citizens' Water Company. The answer of the board discloses the fact that appellee's petition for an injunction was well founded, in that it admits that said board had taken certain steps looking to the passage of an ordinance granting such rights to the Citizens' Water Company; and in fact the proposed ordinance, which it seems the board had agreed to pass, is set forth in terms in the answer in this action, thereby showing clearly that if appellee, under the Constitution and laws of Colorado, is entitled to maintain its grant and franchise in its exclusive character, then a clear

violation of its rights was about to be committed by appellants. And we now make the further suggestion that under the ordinance as it was sought to be passed by the defendants [appellants herein] is constituted a clear violation of the terms of appellee's contract with the town of Highlands, because it not only sought to permit the Citizens' Water Company to construct a system of water works for supplying the inhabitants with water, in direct competition with appellee, but it went further and created a contract between the town of Highlands, as a municipality, and the Citizens' Water Company, for the supplying of at least a portion of the town of Highlands with hydrants and water for municipal purposes. This, of itself, we apprehend, irrespective of the graver questions which are involved in this suit, would be amply sufficient to warrant the court not only in granting but in making perpetual the injunction against the town from passing the ordinance as proposed and set forth in the answer in this case."

The plaintiff company asserts its claims under said contract as assignee and successor to the Beaver Brook Water Company. The prayer of the complaint is as follows: "Wherefore plaintiff prays that a temporary injunction and enjoining order may issue out of this honorable court, and under the seal thereof, enjoining, restraining and prohibiting the said defendants, each of them, as officers of the said town of Highlands, from entering into any contract or agreement whatsoever with the said the Citizens' Water Company for supplying the said town, or the citizens thereof, or any part or portion thereof, with water for any purpose whatsoever, or by resolution, ordinance or in any other way or manner, authorizing, permitting or consenting to the said the Citizens' Water Company furnishing a supply of water to the said town, or to the inhabitants thereof, or to any part or portion thereof, until the further order of the court in the premises, and that upon the final hearing thereof the said injunction be made perpetual, and for the costs of this action."

G. G. Symes, E. M. Sheridan, F. A. Burdick and Helm & Gondy, for appellants. *Charles Hartzeel*, for appellee.

ELLIOTT, J. (*after stating the facts.*) The prayer for relief generally indicates the nature of a bill in chancery. The plead-

ings in this action are too voluminous to be set forth at length in this opinion; they extend through ninety pages of the printed abstract; but the prayer of the complaint and a paragraph from the brief of counsel for the water company sufficiently show the gravamen of the complaint. See foregoing statement.

It is a general principle in the governmental system of this country that the judicial department has no direct control over the legislative department. Each department of the state government is independent within its appropriate sphere. Legislative action by the general assembly cannot be coerced or restrained by judicial process. As was said in another case by this court, "the legislature cannot be thus compelled to pass an act, even though the Constitution expressly commands it; nor restrained from passing an act, even though the Constitution expressly forbids it." The same principle, with perhaps some exceptions, or seeming exceptions, extends to the local legislative bodies of municipal corporations. A court of equity cannot properly interpose any obstacle to the exercise of their legislative discretion upon a subject within the scope of their delegated powers. A municipal ordinance passed in pursuance of valid authority emanating from the state legislature has the same force and effect, within proper limits, as if passed by the legislature itself. It follows, as a logical sequence, that a city council or board of trustees of an incorporated town, when acting, or proposing to act, in a legislative capacity upon a subject within the scope of its powers as conferred by its charter or by the general laws of the state, is entitled to immunity from judicial interference. It is true, the municipal legislative body may adopt an illegal ordinance. So the state legislature may enact an unconstitutional statute. The remedy is the same in either case. By proper and timely application to the courts the enforcement of the unconstitutional statute, as well as the enforcement of the illegal ordinance, may be restrained or corrected. In such case, however, the judicial process is executed against some ministerial or administrative officer, or against some individual or corporation, and thus all substantial injury is averted without direct interference with legislative action or discretion. The Supreme Court of Illinois has recently delivered an elaborate opinion upon this subject. See *Stevens v. Training School*, 144 Ill. 336; 32 N. E.

Rep. 962, and cases there cited ; also, 2 High Inj. § 1243 ; 1 Dill. Mun. Corp. (4th ed.) § 308 ; *Alpers v. City & County of San Francisco*, 32 Fed. Rep. 506 ; *Land Co. v. Routt*, 17 Col. 162 ; 28 Pac. Rep. 1125 ; *Railroad Co. v. Lea*, 5 Col. 192 ; *Phillips v. City of Denver*, 19 Col. — ; 34 Pac. Rep. 902.

Were defendants acting, or proposing to act, in a matter within the scope of their authority, and requiring the exercise of their legislative discretion, when they were enjoined in this action ? When this action was commenced, the town of Highlands was a duly incorporated town under the general laws of this state. The defendant Lewis, as mayor, and the other defendants, Breon, Harvey, Shaw, Lee, Jackson and Kookan, as trustees, constituted the board of trustees of said town. Every board of trustees of an incorporated town under the general laws of this state is, by act of the general assembly, invested with extensive powers, including the power to pass regulations and ordinances having the effect of legislative acts in a large variety of cases. Among the powers thus granted is the power to lay out, open, improve and regulate the use of the streets. The power to regulate the opening in the streets for the laying out of gas or water mains and pipes, and to regulate the use of sidewalks along the streets and alleys, and all structures thereunder, is expressly and specifically conferred by general law upon the boards of trustees of incorporated towns. Act 1877, § 14, cl. 7 ; see Gen. Laws, p. 880 ; Gen. St. p. 965 ; 2 Mills' Ann. St. p. 2262.

From what has already been said, it is apparent that the granting of the injunction in this case was an improper exercise of judicial power. It interfered with the legislative discretion of the board of trustees of the town of Highlands. The injunction restrained the board from acting in its legislative capacity upon a matter clearly within the scope of the powers confided to it by the general laws of the state. The board was clothed with authority to pass ordinances in respect to the construction and operation of water works in said town. Whether the proposed ordinance granting to the Citizens' Water Company the right to construct and operate such works would have been valid, or whether it would have been void, by reason of its being in violation of an existing contract between the plaintiff company and said town of Highlands, is immaterial in this action. The passage

of the proposed ordinance being within the scope of the legislative power conferred upon the mayor and trustees, the granting of the injunction was an erroneous interference with their legislative functions. As was said by Mr. Justice Field in *Alpers v. City & County of San Francisco*, *supra*: "Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one case forbid the passage of a law, nor in the other the passage of a resolution, order or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." There seems to be some diversity of opinion upon this subject, or, as we have intimated, there may be exceptions to the doctrine of non-interference. For example, if it should be made to appear that the legislative body of a municipality was about to pass some ordinance, resolution or order, and that its mere passage would immediately occasion, or be immediately followed by, some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, a court of equity might perhaps extend its strong arm to prevent such loss or injury. This view was indicated by Judges Sawyer and Hoffman in *Water Co. v. Bartlett*, 16 Fed. Rep. 615. So, in *Davis v. Mayor, etc.*, 1 Duer, 498, Mr. Justice Duer, speaking upon this subject, said: "A court of equity will not interfere to control the exercise of a discretionary power, when the discretion is legally and honestly exercised, and it has no reason to believe the fact is otherwise, but will interfere

whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice or oppression, the violation of a trust or the consummation of a fraud. It will interfere, and it is bound to interfere, whenever it has reason to believe that those in whom the discretion is vested are prepared, illegally, wantonly or corruptly, to trample upon rights and sacrifice interests which they are specially bound to watch over and protect." This case was subsequently affirmed by the New York Court of Appeals in 14 N. Y. 506. It is an exceedingly delicate matter for the courts to interfere by injunction with the action, or contemplated action, of a legislative body in any case; and such interference cannot be justified, except perhaps in extreme cases and under extraordinary circumstances. No ground for such interference is presented in the present case, and as the members of the municipal board are the only defendants, no relief can be granted in this action. Entertaining these views, it would be manifestly inconsistent, as well as improper, to intimate any opinion as to the validity of plaintiff's claim to the exclusive right to construct and operate water works for supplying the town of Highlands and its inhabitants with water. The judgment of the District Court is reversed, and the cause remanded, with directions to dismiss the action.*

Jurisdiction of equity to enjoin legislative action of municipal bodies.—In *Stevens v. St. Mary's Training School*, 144 Ill. 336; 32 N. E. Rep. 962, it was held that a court of equity will not enjoin a county board from passing a resolution that an illegal contract be made by the county, and that an illegal claim against the county be allowed, since that would be an interference with a legislative act. The opinion contains an elaborate review of authorities, in course of which it is said: "There are cases which hold, or seem to hold, that where a municipal corporation is about to pass a resolution or ordinance which is void as being ultra vires, a Court of Chancery will enjoin it from so doing. Among such cases may be mentioned the following: *Davis v. Mayor, etc.*, 1 Duer. 451; *People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor*, 14 N. Y. 506. *Spring Valley Water Works v. Bartlett*, 16 Fed. Rep. 615; *Town of Jacksonport v. Watson*, 33 Ark. 70; *State v. Commissioners*, 39 Ohio St. 58; *Page v. Allen*, 58 Penn. St. 338; *Follmer v. Mickolls Co.*, 6 Neb. 204; *Peter v. Prettyman*, 62 Md. 566; *Patt'n v. Stephens*, 14 Bush. 324; *Board of Education v. Arnold*, 112 Ill. 11; *Spiman v. City of Parkersburg*, 35 W. Va. 604; 14 S. E. Rep. 279; *City of Vaparaíso v. Gardner*, 97 Ind. 1; *City of Springfield v. Edwards*, 84 Ill. 626; *Fowell v. City of Peoria*, 90 Ill. 104. In none of the cases last above cited, except the first four, was the ques-

* Reported in 34 Pac. Rep. 993.

tion now under consideration expressly passed upon, but the facts stated in the opinions seem to warrant the conclusion that injunctions were sustained against the corporate action of the municipalities, as distinguished from the action of agents or officers proceeding under their orders. * * *

“ A large number of the decisions which uphold the right of equity to interfere with the action of municipal corporations when such action is in excess of their legal powers will be found, on examination, to be based upon facts which show that the injunctions were issued against the officers or agents attempting to execute or enforce corporate resolutions, ordinances, by-laws or orders, as will be seen by reference to the following cases: *New London v. Brainard*, 22 Conn. 553; *Webster v. Town of Harwinton*, 32 Conn. 131; *Boyle v. City of New Orleans*, 23 Fed. Rep. 843; *Harvey v. Railroad Co.*, 32 Ind. 244; *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 Pac. Rep. 249; *Willard v. Comstock*, 58 Wis. 565; 17 N. W. Rep. 401; *Place v. City of Providence*, 12 R. I. 1; *Austin v. Coggeshall*, 12 R. I. 329; *Sherman v. Carr*, 8 R. I. 431; *Newmeyer v. Railroad Co.*, 52 Mo. 81; *Osterhout v. Hyland*, 27 Hun, 167; *Mayor, etc., of Baltimore v. Gill*, 31 Md 379; *Merrill v Plainfield*, 45 N. H. 126; *Hospers v. Wyatt*, 63 Iowa, 264; 19 N. W. Rep. 204; *Roberts v. Mayor, etc., of New York*, 5 Abb. Pr. 41; *Schumm v. Seymour*, 24 N. J. Eq. 143; *List v. Wheeling*, 7 W. Va. 501; *Rutz v. Calhoun*, 100 Ill. 392; *McCord v. Pike*, 121 Ill. 288; 12 N. E. Rep. 259; *English v. Smock*, 34 Ind. 115; *City of Madison v. Smith*, 83 Ind. 502; *Sackett v. City of New Albany*, 88 Ind. 473; *Wright v. Bishop*, 88 Ill. 302; *Sherlock v. Village of Winnetka*, 59 Ill. 389; *Crampton v. Zabriskie*, 101 U. S. 601. * * *

“ There are many decisions which hold, in express and definite terms, that the courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available. 1 Dill. Mun. Corp. (4th ed.) § 308, note on page 387. There may be instances where this restriction upon the power of the courts will sometimes be disregarded, as when municipal corporations are exercising mere business or ministerial, rather than legislative powers (*City of Valparaiso v. Gardner*, 97 Ind. 1; Dill. Mun. Corp. [4th ed.] §§ 473, 474, 927, 1048); or are wrongfully disposing of property held by them as trustees for the public (*Milbau v. Sharp*, 15 Barb. 193; *Sherlock v. Village of Winnetka*, 59 Ill. 389); or are attempting to act upon matters not, by their charters or by the law, subject to their jurisdiction (*Alpers v. San Francisco*, 12 Saw. 631; 32 Fed. Rep. 503); or where it appears that the mere voting on, and formal passage of, a resolution or ordinance, will instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury. *Whitney v. Mayor, etc.*, 28 Barb. 233. The weight of authority, and the tendency of the more recent decisions, are in favor of the position that the restraining power of the courts should be directed against the enforcement, rather than the passage, of unauthorized rules and resolutions, or ordinances, by municipal corporations. To this effect are the following authorities: *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505; *Linden v. Case*, 46 Cal. 171; *Merriam v. Board of Supervisors*, 72 Cal. 517; 14 Pac. Rep. 137; *City of Chicago v. Evans*, 24 Ill. 52; *Whitney v. Mayor, etc.*, 28 Barb. 233; *People v. Mayor*, 32 Barb. 35; *People v. Mayor*, 9 Abb. Pr. 253; *Railroad Co. v. Smith*, 29 Ohio St. 291;

Harrison v. City of New Orleans, 33 La. Ann. 222; Alpers v. San Francisco, 12 Saw. 631; 32 Fed. Rep. 503; 2 High Inj. (3d ed.) § 1243." Consult Mouldin v. City Council, 3 Am. R. R. & Corp. Rep. 64; Spilman v. City of Parkersburg, 5 Am. R. R. & Corp. Rep. 370.

BOOTH v. ROME, W. & O. T. R. Co.

(Court of Appeals of New York, December 5, 1893.)

1. RAILROAD COMPANIES. INJURY TO ADJACENT PROPERTY BY BLASTING. RIGHTS OF COMPANY AS TO ADJACENT OWNERS. The powers granted to railroad corporations are construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in the execution of such powers were done by an individual.

2. RIGHTS OF ADJACENT PROPRIETORS IN RESPECT TO USE OF THEIR PROPERTY. The test of the permissible use of one's own land is not whether the use causes damage to his neighbor, but the inquiry is, was the use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.

3. LIABILITY OF RAILROAD COMPANY FOR INJURY TO ADJACENT PROPERTY CAUSED BY BLASTING. A railroad company which, having to do blasting on its own land in order to lay its tracks, exercises due care in doing it, and uses charges of no greater force than are necessary for the purpose, is not liable for injury to adjoining property arising merely from the incidental jarring.

4. If the damage in such case results from the failure of the railroad company to use due care, it will be liable.

THIS appeal is from a judgment of the General Term of the fifth department affirming a judgment on verdict for the plaintiff. The principal facts upon which the question presented arises are as follows: The defendant is a railroad corporation organized under the General Railroad Law of this state. In 1887 it owned a lot in the city of Rochester extending from the west side of St. Paul street to the Genesee river, adjacent to a lot owned by the plaintiff on the south, purchased by her in 1885, on which was a dwelling occupied by her, fronting on St. Paul street, the north side of which was about six feet south of the north line of her lot. The defendant projected an extension of its road from a point east of St. Paul street to the Genesee river, and thence across the river by a bridge. It obtained the consent of the municipal authorities to cross St. Paul street by a tunnel or cutting,

and proceeded to extend its road across the street to the river. Its line crossed St. Paul street from a point on the east side of the street opposite the lot of the defendant, striking the center of the defendant's lot on the west side, and thence ran longitudinally through the lot to the bank of the river. It became necessary, in order to comply with the conditions imposed by the city authorities, that the defendant's roadbed at the crossing should be depressed fifteen feet or more below the surface of the street. The excavation required for this purpose involved also the necessity of continuing the cutting through the lot of the defendant so as to procure a uniform grade. The soil extended about ten feet below the surface, and underlying that was rock, which it became necessary to remove to the depth of about four feet. It was loosened by blasting with gunpowder. It was claimed by the plaintiff, and evidence was given tending to show, that in consequence of the blasting the plaintiff's house was seriously injured; that the foundations were cracked, the beams and joists pulled apart, the plaster loosened, and that, generally, the house was wrenched and rendered insecure. It is not claimed that any rock or materials were thrown by the blasts upon the plaintiff's lot. In what particular way the injury was produced was not shown. It may be inferred that it was caused by the jarring of the ground or the concussion of the atmosphere created by the explosions, or by both causes combined. It was, however, affirmatively proven, without contradiction, that there was no disturbance of the earth on the sides of the excavation, and that gas and water pipes in the street, exposed by the excavation, were not displaced or injured. It was substantially conceded that the defendant exercised due care in conducting the blasting, and that it was necessary in order to remove the rock. There was evidence tending to show that the persons engaged in the work were informed from time to time during its progress that injury was being done to the plaintiff's house. The trial judge instructed the jury that the defendant, in using powerful explosives in blasting the rock, used them at its peril, and that if the plaintiff's house was injured thereby the defendant was liable for the damages occasioned, and "that it made no difference whether the work was done carefully or negligently." Exception was taken by the defendant to this instruction. The jury found that the damage to the house

from the blasting was \$1,750, and this sum was included in the verdict. The court overruled the contention of the defendant that in constructing its road it was acting under legislative authority, and was on that ground, in the absence of negligence, exempted from liability, even although, as between individuals, an action might be maintained. Other facts are stated in the opinion.

P. M. French, for appellant. *David Hays*, for respondent.

ANDREWS, Ch. J. (*after stating the facts*). We entertain no doubt of the correctness of the ruling at the Circuit that the defendant stands in no better position in defending the action than if the controversy was between individuals. The rule that the legislature may, in the public interest and for public purposes, authorize and legalize acts causing consequential injury to private property, not amounting to a taking, without providing compensation, and that the legislative authority may be pleaded in bar of any claim for indemnity, although if the act had been done without such authority an action would lie, has no application to acts of a railroad or other private corporation in the execution of chartered or statutory powers. The rule adverted to, although operating in some cases with great severity, which compels an individual to bear a special loss for the benefit of the community at large, in place of distributing the burden, is an application of the maxim, "*salus populi est suprema lex*," and rests upon the transcendent power of the legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad carries with it immunity from liability in executing the work for consequential damage to private property, to the same extent as pertains to the sovereign in executing public works (*Bellinger v. Railroad Co.*, 23 N. Y. 42), it is now the settled doctrine in this state that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual. *Cogswell v. Railroad Co.*, 103 N. Y. 10; 8 N. E.

Rep. 537. This doctrine accords with reason, and with the presumed intention of the legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which will result from the construction of its road. The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent. There may be limited exceptions, as in cases of highway crossings, where an adjustment of the grade becomes necessary, working a consequential injury to adjacent landowners, which is remediless; and the legislative authority will also bar any remedy for certain discomforts consequent upon the necessary operation of the road, such as noise and smoke of passing trains. We, therefore, agree with the courts below that the right of the plaintiff to recover in this case, and the liability of the defendant, depend upon the same rule as would govern the parties if both were natural persons, and the injury to the plaintiff's dwelling had resulted from blasting by an adjacent owner on his land in the course of adapting it to individual uses.

The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving way before the excavation was commenced. But, the verdict having been affirmed by the General Term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting would not alone sustain the action. It must further appear that the defendant, in using explosives, violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur to create a cause of action. If the injury was occasioned by the omission to use due care this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded. If one, by carelessness in making an excavation on his own land, causes injury to an adjoining building, even

where the owner of the house has no easement to support, he will be liable. *Leader v. Moxton*, 3 Wils. 460; *Lawrence v. Railway Co.*, 17 Adol. & E. (N. S.) 643-653; *Leake Real Prop.* 248. The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of its neighbor, without the most cautious regard for its neighbor's rights. This would be reasonable care only under the circumstances. If it was practicable, in a business sense, for the defendant to have removed the rock without blasting, although at a somewhat increased cost, the defendant would, we think, in view of the situation, and especially after having been informed of the injury that was being done, have been bound to resort to some other method. There is evidence that rock from some parts of the excavation was loosened by the use of iron bars, and, if this was practicable as to all of it, the jury might well have found that this means should have been adopted. So, also, if less powerful blasts might have been used, which, if used, would not have occasioned injury, or would have lessened it, the omission to use them might well be considered as negligence. The mode of exercising a legal right, where there is a choice of means, may of itself give a cause of action. The plaintiff, however, on this record, is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial, and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on its own premises in order to adapt them to a lawful use; the mode adopted being the only practicable one, and the work having been prosecuted with due care and without negligence. The question is whether the act of the defendant, connected with the resulting injury, was a legal wrong, for which the plaintiff has a right of action.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbor to the use of his property, so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use by one of his own property, which annoys or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is that one may not use his own property to the injury of any legal right of another. The cases are numerous where the lawful use of one's property causes injury to adjacent property, for which there is no remedy, because no right of the adjacent owner is invaded, although he suffers injury. The cases of excavation furnish a striking illustration. The easement of natural support of the land of one by the land of the adjacent owner applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one, by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. There is, in the case supposed, injury, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property. *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mees. & W. 220; *Lasala v. Holbrook*, 4 Paige, 170; *Thurston v. Hancock*, 12 Mass. 220.

The fundamental proposition upon which the plaintiff's counsel rests his argument in support of the recovery is that the use of the explosives in blasting constituted, under the circumstances, a private nuisance, and that, according to the general rule of law, one who creates or maintains a nuisance is liable for any special injury to person or property resulting therefrom. The right of the defendant to excavate on its land for its roadbed is not

challenged, but the right to use the destructive agency of gunpowder in the work of excavation, liable to produce injury, and which did occasion it, is denied. The exception is not to the thing done, but to the mode of doing it. It is to be observed, however, that, under the concessions in the case and the rulings on the trial, it must be assumed that the excavation could not have been done except by the use of explosives. This mode of doing the work was, therefore, of the substance of the right, if the right existed at all. It has been frequently said that the right of an owner of land to use his property as he likes does not justify the maintaining of a nuisance or the commission of a trespass; and Blackstone, after stating that where one, by smelting works on his own land, causes noxious vapors, which injure the corn or grain on his neighbor's land or damages his cattle, this would be a nuisance, proceeds to say "that if you do any other act in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive." 2 Bl. Comm. chap. 13, p. 218. There are many illustrations in the books of the doctrine stated by the learned commentator, that the use of one's own land for the purpose of a lawful trade may become a nuisance to his neighbor. But whether a particular act done upon, or a particular use of, one's own premises, constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place and circumstances. It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort or injury to his neighbor, which are *damnum absque injuria*. The case of the building caused to fall by an excavation in an adjoining lot, already referred to, is an illustration. The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein, and to be discharged into an adjacent mine on a lower level, thereby causing damage to the mine of such adjacent owner, is another illustration of a lawful use of property, followed by damage to the property of another, for which no action lies. *Smith v. Kenrick*, 7 C. B. 515; *Baird v. William-*

son, 15 C. B. (N. S.) 376 ; Wilson v. Waddell, 2 App. Cas. 95. In referring to these cases in Hurdman v. Railway Co., 3 C. P. Div. 168, the court said : " The owner of lands holds his right to the enjoyment thereof subject to such annoyance as is the consequence of what is called the 'natural use by his neighbor of his land,' and that, where an interference with his enjoyment by something in the nature of a nuisance is the cause of complaint, no action can be sustained, if this is the result of a natural use by a neighbor of his land." Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the vicinity, and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitute nuisances, and such use is not justified by the right of property. Fish v. Dodge, 4 Denio, 311 ; McKeon v. See, 51 N. Y. 300 ; Cogswell v. Railroad Co., supra. These and like cases are those where the property of the owner is appropriated to a permanent use, which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous, and temporary acts which are resorted to in the course of adapting premises to some lawful use. For example, the erection of an iron building, adjacent to a dwelling, might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises ; but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy.

The rule announced by the trial judge, that the use, by an owner of property, of explosives, in excavating his land, is at his peril, and imposes liability for any injury caused thereby to adjacent property, irrespective of negligence, is far-reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing, when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent, or tend to prevent, the improvement of property. The first occupant, in building on his lot, exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. *Platt v. Johnson*, 15 Johns. 213; *Thurston v. Hancock*, *supra*; *Tipping v. Smelting Co.*, 1 Ch. App. 66; *Campbell v. Seaman*, 63 N. Y. 568. The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling; but it cannot, we think, exclude the former from using the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hayes v. Cohoes Co.*, 2 N. Y. 159, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defend-

ant of the land of the plaintiff. This, the court held, could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. The case of *Benner v. Dredging Co.*, 134 N. Y. 156; 31 N. E. Rep. 328, was the case of an injury to the plaintiff's house, resulting from the jarring caused by the blasting of rocks in Hell Gate; and it was held that the injury was remediless, for the reason that the defendant was acting under the authority of the government of the United States, by virtue of a contract authorized by congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby. *Myers v. Malcolm*, 6 Hill, 292; *Heeg v. Licht*, 80 N. Y. 579. So, also, it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action. *City of Tiffin v. McCormack*, 34 Ohio St. 638; *Scott v. Bay*, 3 Md. 431. Many of the cases cited by the counsel are cases of the permanent appropriation of property, for damages, or noxious uses causing damage. The distinction between such cases and those where the injury arises from acts done in the necessary adjustment of property for a lawful use by means necessary, and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent landowners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In *Marvin v. Mining Co.*, 55 N. Y. 557, the opinion of the learned judge who wrote in that case sustains the conclusion we have reached in this case. But the point was not necessarily involved, since it was held that the defendant there had acquired by grant the right to employ blasting in removing the mineral, and that the plaintiff, a subsequent grantee of the surface, could not complain of injury to his house therefrom, in the absence of negligence on the part of the defendant in conducting the work. Judge Folger, in that case, said:

"Whatever it is necessary for him (defendant) to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do, though it harm erections lately put there." If the learned judge intended to lay down the rule that the owner of land may do anything on his own land which would do no injury to the adjacent property if it had remained in its natural state, the proposition is probably too broad. One may do in a barren waste many things which he could not lawfully do in or near an inhabited town. But the defendant here was engaged in a lawful act. It was done on its own land, to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to its neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land; but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use, that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent landowners in the use of their property, seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested, also, in the preservation of property and property rights from injury. Will it, in this case, protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means

necessary, usual and generally harmless? We think not. The judgment should be reversed and a new trial ordered, with costs to abide the event. All concur.*

Railroad companies — injuries to adjoining property by blasting.— The foregoing case would seem to be fairly open to criticism. Undoubtedly every owner of land may make a *reasonable* use of his land. So every owner of land has a right not to be injured in its use or enjoyment by an *unreasonable* use of adjoining land. These mutual rights and obligations are elaborately discussed in *Thompson v. Androscoggin River Improvement Co.*, 54 N. H. 545, and *Eaton v. Railroad Co.*, 51 N. H. 504. As to what is a reasonable or unreasonable use of one's land is largely a question of fact. Any use may be declared reasonable when, though it may in some cases injuriously affect adjoining property, the right to make such use would tend to the "highest enjoyment of land by the entire community of proprietors." See *Thompson v. Androscoggin River Improvement Co.*, 54 N. H. 545. Now it may be seriously doubted whether the right to use explosives in excavating upon one's land in such manner as to shake down or greatly impair buildings on adjoining property, is one which, on the whole, will conduce to the highest enjoyment of land by the entire community. In other words, it would seem more to the advantage of the whole community that one who desired to excavate rock on his land should be required to do so in such manner as not to materially injure adjoining property.

If one, in blasting upon his own land, projects fragments of rock upon his neighbor's land, he is liable for the damage. But where land is taken for a public use and blasting is necessary to adapt the land for such use, there is a conflict of authority as to whether such damages are included in the award of compensation for taking the property or whether they constitute a separate cause of action. See *Eaton v. Railroad Co.*, 59 Maine, 520; *Tibbetts v. Knox & Lincoln R. Co.*, 62 Maine, 437; *Hay v. Cohoes Co.*, 3 Barb. 42; S. C., 2 N. Y. 159; *Tremaine v. Same*, 2 N. Y. 163; *Carman v. Stubenville & Ind. R. Co.*, 4 Ohio St. 399; *Sabine v. Vermont Central R. Co.*, 25 Vt. 363; *Dodge v. County Comrs.*, 3 Met. 380; *Brown v. Providence, etc., R. Co.*, 5 Gray, 35; *Whitehouse v. Androscoggin R. Co.*, 52 Maine, 208; *St. Peter v. Denison*, 58 N. Y. 416.

WHITE v. NORTHWESTERN NORTH CAROLINA R. Co.

(Supreme Court of North Carolina, December 5, 1893.)

1. RAILROADS IN STREETS. RIGHT OF ABUTTING OWNER TO DAMAGES. The use of a street for a steam railroad is not a legitimate use for public purposes, and, if abutting property is injured thereby, the owner is entitled to damages, whether the fee is in him or the city.

* Reported in 140 N. Y. 267; 35 N. E. Rep. 592.

2. Abutting owners, who do not own the fee of the street, have certain proprietary rights therein, of which they cannot be deprived without just compensation, the chief of which are the easements of light, air and access.

3. REMEDIES. Where a railroad is laid in a public street without condemning the abutting owner's rights, the latter may maintain a common-law action for damages to be assessed up to the time of the trial, or he may sue for the permanent damage inflicted upon his property by reason of the location and construction of the road, and in such case a recovery will confer upon the company an easement to occupy the street.

E. B. Jones, for appellant. *Glenn & Manly*, for appellee.

SHEPHERD, Ch. J. The plaintiff is the owner of a lot abutting upon one of the streets of the city of Winston, and brings this action to recover damages for various injuries to her said property, inflicted by the defendant by reason of its having entered upon and constructed its railroad through the said street. It appears from the complaint that prior to the plaintiff's purchase of the property, in 1879, the street had been "located and opened for the use and benefit of plaintiff and others, and the public generally, who owned property north of Liberty street, which was almost inaccessible by or over any other street." It also appears that in the construction of its road the defendant made an excavation in front of said property 223 feet in length and thirty-five or forty feet in depth and width, and thereby reduced the width of the street from thirty to eighteen feet. It is further alleged that by "reason of the nature of the soil and the proximity of the cuts, travel along the said street is rendered dangerous, and that, in order to sustain the width of the same fifteen to eighteen feet, the defendant has put in pillars or posts to hold and retain the earth composing the street in position, which plaintiff alleges is insecure and unsafe, and liable to destroy and render useless the said street." It is furthermore alleged that by reason of such excavation and occupation by the defendant the street at certain points along the line of plaintiff's property is almost entirely destroyed, and that plaintiff is greatly damaged. These allegations, extracted from the complaint, must, for the purposes of the appeal, be taken as true, as no evidence seems to have been introduced on the trial, and his honor rejected the issue as to the alleged damages sustained by the plaintiff on the ground that the defendant "had a license from the city to construct its road and

use the street if necessary." The questions presented, therefore, are whether, as against the abutting owner, the city can authorize the use of its streets for the purposes of an ordinary steam railroad, and whether such abutting owner has any proprietary rights, for the violation of which she can maintain an action. It does not appear how the city acquired its title to the street in question, nor do we learn from the record whether it owns the fee in the soil or simply an easement therein. In the absence of evidence, however, the presumption is that the city has an easement only, and that the fee remains in the abutting proprietor. *Elliott Roads & S.* 110; *Rich v. City of Minneapolis*, 37 Minn. 423; 35 N. W. Rep. 2; 3 Kent Comm. 432. In such a case "the abutting owner is entitled to every right and advantage in that part of the street of which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only." *Lewis Em. Dom.* § 113. It must follow, therefore, that if the city perverts the streets to illegitimate purposes, it is an interference with the proprietary rights of the abutter, and that he is entitled to relief at the hands of the courts.

This introduces us to the very important question never before passed upon by this tribunal, whether or not the use of a steam railroad is a perversion of the street from its original and proper public purposes. There has been much discussion, and not a little conflict of judicial decision, upon this subject; but it is believed that the weight of authority greatly preponderates in favor of the affirmative view of the proposition. Judge Dillon, after a careful investigation, states his conclusion as follows: "The weight of judicial authority undoubtedly is that where the public have only an easement in the streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guaranty of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." 2 Dill. Mun. Corp. 725. In *Mills on Eminent Domain* (§ 204) the same doctrine is laid down, and it is said: "The legislature may authorize the use of a street by the railroad,

so as to make the entry lawful; but the use is an additional burden, and the right will not become fixed in the company until compensation is made. If no remedy is provided, there is remaining the remedy at common law." In *Lewis on Eminent Domain* (§ 111) the able and discriminating author remarks: "To us it seems so clear that a railroad is foreign to the legitimate uses of a highway that we never have been able to understand how a court could reach a contrary conclusion." After stating that highways have from time immemorial been devoted to the common use of every citizen, and that no one had a private right or any exclusive privilege therein, the author proceeds: "The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks, which would practically exclude all ordinary travel, and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence." In *Elliott on Roads & Streets* (p. 528) the author cites many authorities, and concludes by saying that the weight of authority is that such an appropriation of a street is "a new and additional burden," for which the abutter is entitled to compensation. In support of his proposition he quotes the following language of Judge Cooley: "Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it. The two uses, on the other hand, come seriously in conflict. The railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it, and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes of a railroad company engaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be specially injurious." *Const. Lim.* (3d ed.) 683. In *Hare*

Const. Law, 361, the foregoing doctrine is fully approved, and it is said: "It is immaterial, as regards the principle, whether the land is given voluntarily or taken under the right of eminent domain. If the owner dedicates the land, it is for the continuing uses of a street; if it is condemned, such also is the end in view. To convert a common highway over a man's land into a railroad is, therefore, to impose an additional burden upon the land, which greatly impairs its value, considered as a whole; and if the owner is not compensated his consent must be proved. It cannot be said with truth that in assenting to the laying out of the highway upon his land he consented to the building of a railroad upon it, because they are essentially different. The one benefits his land, renders access to it easy, and enhances the price; while the other makes access to it difficult and dangerous, and renders it comparatively valueless. Nor can it be justly contended that a railway is merely an improved highway. * * * Were the transaction between individuals, every one would see the injustice of such a conclusion. The doubt arises from the supposition that the public interest is involved; and it was to guard against the bias arising from this source that the Constitution interfered to protect the citizen. It follows that the dedication of land as a street does not preclude the owner from bringing trespass or ejectment or obtaining an injunction against a railway company which is about to enter upon and occupy the way, and that the company cannot (in the absence of the exercise of the right of eminent domain) rely upon a grant from the legislature and the license or consent of the municipality as a justification." Booth, in his work on Street Railways (§ 78), after stating that in the early history of commercial railroads the current of authority was contrary to the views above stated, remarks: "But, according to the weight of judicial opinion as expressed during the last thirty years, where the fee of the street remains in the adjoining owner, such use is inconsistent with the purposes of the original acquisition, and, without compensation, can only be acquired by the exercise of the power of eminent domain."

In the discussion of the question, we have preferred to reproduce the conclusions of eminent text writers, rather than attempt a review of the numerous decisions upon which they are founded.

These decisions and others we could cite fully establish, upon principle and by weight of authority, the proposition that, where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against his will and without compensation. *Railroad Co. v. Heisel*, 47 Mich. 393; 11 N. W. Rep. 212; *Railroad Co. v. Reed*, 41 Cal. 256; *Imlay v. Railroad Co.*, 26 Conn. 249; *Railroad Co. v. Steiner*, 44 Ga. 546; *Daly v. Railroad Co.*, 80 Ga. 793; 7 S. E. Rep. 146; *Cox v. Railroad Co.*, 48 Ind. 178; *Kucheman v. Railway Co.*, 46 Iowa, 366; *Railroad Co. v. Hartley*, 67 Ill. 439; *Phipps v. Railroad Co.*, 66 Md. 319; 7 Atl. Rep. 556; *Springfield v. Railroad Co.*, 4 Cush. 63; *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Railroad Co. v. Ingalls*, 15 Neb. 123; 16 N. W. Rep. 762; *Chamberlain v. Cordage Co.*, 41 N. J. Eq. 43; 2 Atl. Rep. 775; *Railroad Co. v. Williams*, 35 Ohio St. 168; *Ford v. Railroad Co.*, 14 Wis. 609; *Carl v. Railroad Co.*, 46 Wis. 625; 1 N. W. Rep. 295; *Buckner v. Railroad Co.*, 60 Wis. 264; 19 N. W. Rep. 56; *Railroad Co. v. McAhren*, 12 Ind. 552; *Theobald v. Railroad Co.*, 66 Miss. 279; 6 South. Rep. 230; *Barney v. Keokuk*, 94 U. S. 324; *Adams v. Railroad Co.*, 39 Minn. 286; 39 N. W. Rep. 629. The principle, then, being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must, of course, follow that the city had no right, in the exercise of its usual and ordinary powers relating to its highways, to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff. The plaintiff, therefore, taking her allegations to be true as to the damage inflicted upon her property, very plainly has a cause of action against the defendant.

If, however, we are wrong in the assumption that the plaintiff is the owner of the fee in the said street, and if it should appear upon another trial that the city has acquired it either by dedication, grant or condemnation, it will be necessary to determine whether the plaintiff has an easement in said street to the extent that it shall be used only for street purposes, and whether her rights are "property rights," which cannot be

impaired or destroyed except under the exercise of the right of eminent domain. Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle, which has been slowly but surely evolved from protracted discussion and experience, is that in respect to the use of the soil for the purposes of a street (and apart from those reversionary or other rights peculiar to legal ownership) it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well as the capacity of a municipal corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes; and in the case of land acquired for the purposes of a street there is something in the nature of a contract, under which two co-existent and inviolable rights are created — one belonging to the public to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street it must be presumed that he does so in consideration of the contemplated benefits accruing to his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration, it is also fair to assume that in estimating the amount to be paid the value of the benefits above mentioned were likewise considered. In such cases, says Mr. Lewis (Em. Dom. § 114): “To make the right a part consideration of the grant, and then allow the public to invade or destroy it at pleasure, would be a fraud, which the law will neither impute nor allow. Therefore, in the case of such a grant there arises by operation of law a private right to use the street in connection with the lot of the proprietor, which is as inviolable as any other right of property.” So, if the city acquire the land by condemnation, such advantages or benefits to the adjoining property are usually assessed at a fixed value, and deducted from the estimated damages; and it would, says the above author, be “the grossest inequity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid, or of an assessment of benefits, unless those advantages are secured to him by a clear

title. * * * The existence of these private rights and easements is strictly independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street."

The true principles applicable to this question have been declared by the Court of Appeals of New York in *Story v. Railroad Co.*, 90 N. Y. 122, and *Lahr v. Railroad Co.*, 104 N. Y. 268; 10 N. E. Rep. 528. These cases have been followed by subsequent decisions of other states, and their doctrine has been approved by the most prominent writers upon the subject. The opinions are very elaborate, and we cannot do better than to adopt Judge Dillon's summary of some of the principles enunciated: "These judgments, and those that follow them, rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public — that is, to the paramount rights of the public for street uses proper — or whether the fee is in the public for street uses proper, in either case, and generally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, subject, of course, to legislative and municipal regulations; and that such rights are property or property rights in the abutter, which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. * * * If the abutter owns the fee of the street his rights may be said to be legal in their nature. If he does not own the fee those rights are in the nature of equitable easements in fee; the soil of the street being the servient, the abutting owner's lot being the dominant, tenement. Among the most important of such rights or easements is the abutter's right to access, to light and to air. The court accordingly held that, so far as the elevated railway structures interfered with such rights or easements, while the legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz., on condition of making compensation to the abutting owner for the damage which his property actually sustained." "The result of the author's reflections upon this subject is that the views of the Court of Appeals are sound and just; sound, because they recognize the paramount nature of

the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special proprietary rights or easements in their nature which he is not called upon unequally to sacrifice without compensation for the public use. In effect, the court says the just and true doctrine is, 'Take, but pay.' " 1 Hare Const. Law, 370, 375; Lewis Em. Dom. §§ 114, 115; Booth St. Ry. Law, § 81; Barney v. Keokuk, *supra*; Railroad Co. v. Schurmeir, 7 Wall. 272; 1 Ror. R. R. 524; Story v. Railroad Co., *supra*; Haynes v. Thomas, 7 Ind. 38; Railroad Co. v. Steiner, 44 Ga. 546; Theobald v. Railroad Co., *supra*. The contrary view, laid down in Wood's Railway Law (vol. 2, p. 727), seems to be based upon the restricted interpretation of the word "taken;" it being applied by some of the courts only to property actually taken and occupied, and all incidental damages to adjoining proprietors are regarded as "consequential" in their character, and *damnum absque injuria*. The learned author admits that such would not be the case if the words used were "taken or damaged," but by a reference to the opinion in Staton v. Railroad Co., 111 N. C. 278; 16 S. E. Rep. 181, it will appear from the cases cited that this restricted meaning of the word "taken" is not in accord with the more recent and better authorities, and is being rapidly submerged by the steady and increasing current of judicial decision. Lewis Em. Dom. 58; Pumpelly v. Green Bay Co., 13 Wall. 166; Eaton v. Railroad Co., 51 N. H. 504.

The result of the numerous authorities is that in either view of the case — that is, whether the fee is in the plaintiff or in the city — the plaintiff has certain proprietary rights, of which she cannot be deprived, even under the authority of the legislature, without compensation. If her property is any way injured by the use of the street for legitimate purposes, she cannot complain. But if the enjoyment of her private rights in the street is interrupted by a perversion of the street to uses for which it was not intended, and which the public right does not justify, and her property is thereby injured, and its value impaired, she may maintain an action, and recover such damages as she may have sustained. These proprietary rights in the use of the street for proper public purposes are practically, as we have seen, the same irrespective of the ownership of the soil, and are not confined to

the mere right of access, since this may not be disturbed although the street may be reduced in width to ten or fifteen feet. This view is well sustained in the leading case of *Adams v. Railroad Co.*, (Minn.) 39 N. W. Rep. 629, in which the court said: "Take a case in one of the states where the fee of the street is in the state or municipality, and of a street sixty feet wide. The abutting lot owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to the width of ten or fifteen feet, would it be an answer to objection by lot owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer." The interest of the abutting owner in the entire width of the street, subject to the proper uses of the public, upon the authority of the above decision, has been declared by this court in *Moose v. Carson*, 104 N. C. 431; 10 S. E. Rep. 689, and cannot be regarded as an open question. See, also, *Haynes v. Thomas*, *supra*. If, then, the value of the property is lessened by reducing the width of the street, or if such damage is caused by excavations rendering it unsafe and dangerous, as stated in the complaint, the plaintiff is entitled to recover. It will be observed that the defendant did not introduce its charter, or show that it had condemned any part of the street or the rights or easement of the abutting proprietor. It justifies its conduct solely upon the mere license of the city of Winston, and in this view of the case its occupation, in so far as it affects the plaintiff, must be regarded as unlawful. If this be so, the plaintiff may maintain a common-law action for damages to be assessed up to the time of the trial; or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street. Had the defendant entered under some statutory authority, it would be important to consider whether the plaintiff would not be confined to the statutory remedy; but, as it does not appear to have entered under any

other authority than the bare unauthorized license of the city, and as the ruling of the court is based expressly upon the validity of such license, we must conclude that the plaintiff has a right to maintain the present action, and that the issue as to the damages actually sustained should have been submitted to the jury. As the facts were not fully developed on the trial, we do not deem it proper to further pursue the discussion. New trial.*

RAILROADS IN STREETS — RECENT DECISIONS.

1. Rights and remedies of abutting owner.— Where a railroad is laid down in a public street, the abutting property is damaged, within the meaning of section 9, article 3, of the Constitution of West Virginia, to the extent of the depreciation caused by the construction and operation of the road. *Stewart v. Ohio River R. Co.*, (W. Va.) 18 S. E. Rep. 604.

Where a city ordinance, accepted by a railroad company authorizing it to construct its road upon the streets, provides that it shall pay to any person or property owner "all" damages they may sustain, and that it shall indemnify the city for any liability, direct or remote, it may incur from the granting of the right of way, the damages recoverable by a property owner are only those fixed by the established rules of law, and do not include remote and speculative damages. *Henderson Belt R. Co. v. Dechamp*, (Ky.) 24 S. W. Rep. 605.

Under the provision of a street railway company's charter that "whenever any estate abutting on a street or highway upon or over which the rails of said corporation shall be laid shall be injured thereby the said corporation shall be liable to pay the owner or owners thereof the damages thereby occasioned to said estate," damages can be recovered for injuries resulting from the laying of the rails only as distinguished from those resulting from the using of them as laid. *Vose v. New York Street R. Co.*, 17 R. I. 134; 20 Atl. Rep. 267.

The owner of a business stand abutting upon a public alley sustains special damage — that is, damage not shared in by the public at large — if, by the illegal obstruction of the alley, customers are prevented from having and using the same as a means of access to the stand, for the purposes of trade, as they have been habitually doing for many years previously. *Harvey v. Georgia Southern R. Co.*, 90 Ga. 66; 15 S. E. Rep. 788. It is no answer to this grievance by a railroad company unlawfully obstructing the alley that new and increased custom will result to the plaintiff's business by reason of the obstruction itself (the same being a depot to be placed across the alley), and other improvements which will be erected by the company at and near the point where the depot is to be located and maintained, nor can any increase in the value of the plaintiff's property, anticipated as a probable effect of the company's new improvements and works, be taken into the account as a set-off against injury to business. *Ibid.*

Where a railroad company, for the purpose of approaches to an overhead street crossing, constructs embankments in the street that extend in front of

* Reported in 18 S. E. Rep. 380.

plaintiff's lots, he is entitled to recover damages sustained thereby, under Code Iowa, section 464, which provides that no railroad company shall occupy a street until the resulting injury to property abutting thereon has been ascertained and compensated. *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa, 27; 50 N. W. Rep. 222.

2. Where abutter owns the fee, a commercial railroad thereon is a taking.—A lot owner, who also owns the fee to the center of the street on which it abuts, subject only to the right of way in the public, has such an interest in the street as will support a proceeding under Revised Statutes, section 1852, to recover against a railroad company compensation for taking his property for public use. *Taylor v. Chicago, M. & St. P. R. Co.*, 83 Wis. 636; 53 N. W. Rep. 853.

3. Whether electric railway an additional servitude.—A turnpike road was chartered in 1804. By acts long subsequent an electric railway was authorized to be constructed thereon. It was held that the use of electricity as a motive power for propelling cars on the railway did not constitute it an additional servitude, entitling an abutting property owner who had no interest in the land occupied by the turnpike to compensation or to an injunction, though neither the legislature authorizing the construction of the turnpike, nor the property owners from whom the land on which it is built was obtained, contemplated the building and operation thereon of an electric railroad. *Green v. City & Suburban R. Co.*, (Md.) 28 Atl. Rep. 626.

4. Misuse of street by railroad — right of abutter.—In *Evans v. Chicago, etc., R. Co.*, (Wis.) 57 N. E. Rep. 354, it was held that a grant to defendant railroad company's predecessor of the right to construct and maintain its railroad in the street, in front of plaintiff's lot, as the same was at the date of the instrument constructed, gave defendant no right to destroy the street as a highway in front of plaintiff's lot by converting the same into a switchyard and station ground; that such use of a street was unlawful under Revised Statutes of Wisconsin, authorizing railroad companies to construct and operate their tracks along streets only on condition that they restore such streets to their former state of usefulness, and that plaintiff was entitled to recover the damages to his property caused by such use of the street. The court says: "According to the complaint, the defendant has had no authority, as against the plaintiff, to obstruct the street in front of his premises, except under and by virtue of the instrument in writing whereby there was granted to the defendant's predecessor 'the right to construct, maintain and operate its railroad' in the street, 'in front of said lot, * * * as the same was at the date of said instrument constructed.' Of course, this grant gave to the defendant's predecessor, and so to the defendant, all the rights which are thereby necessarily implied. But, manifestly, it gave to neither the right to destroy the street as a public highway in front of the plaintiff's lot. The statutes only authorized such construction and maintenance of such railroad in the street on condition that the company should restore the highway 'to its former state, or to such condition as that its usefulness' should 'not be materially impaired and thereafter maintain the same in such condition against any effects in any manner produced by such railroad.' Rev. St. § 1828, subd. 5, and § 1836. It has repeatedly been held that such duty is enforceable by the courts. Town

of Jamestown v. Chicago, B. & N. R. Co., 69 Wis. 648; 34 N. W. Rep. 728; City of Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 544; 48 N. W. Rep. 489; State v. Chicago, M. & N. R. Co., 79 Wis. 259; 48 N. W. Rep. 243. Thus it appears that the obstruction and interference with the street complained of were not authorized by statute. The case, therefore, is clearly distinguishable from that class of cases where the incidental injury complained of is the necessary result of an authorized taking of land, and the proper and authorized use of the same. 'A railroad company cannot monopolize a street in derogation of the public and private use to which it has been applied.' City of Janesville v. Milwaukee & M. R. Co., 7 Wis. 484. In Farrand v. Railway Co., 21 Wis. 439, Dixon, Ch. J., said: 'The company has no right to appropriate the whole or any part of the street to its own exclusive use, as for side tracks, switches, engine houses, depot buildings and the like, and so destroy the public right of way.' In Railroad Co. v. Angel, 41 N. J. Eq. 316; 7 Atl. Rep. 432, it was held that 'a railroad company using, for the purposes of a terminal yard, a portion of a street over which it has only a right of way is responsible for any nuisance, public or private, thereby created.' The same rule was applied in the same state, where, as here, the railway company acquired the right to lay its track in a public street by grant. Thompson v. Railroad Co., 14 Atl. Rep. 897, affirmed, 45 N. J. Eq. 870; 19 Atl. Rep. 622. In Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 329; 2 Sup. Ct. Rep. 719, Mr. Justice Field, speaking for the court, said 'The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. * * * Plainly, the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. * * * For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and, when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. Id.; 137 U. S. 568; 11 Sup. Ct. Rep. 185. See, also, New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 Sup. Ct. Rep. 743. In the case in 29 Ch. Div. 89, cited, the railway company, under the authority of an act of parliament, purchased a piece of land adjoining one of its stations and used it as a cattle dock, and yet it was held that the act gave the company no authority to create a nuisance to occupiers of houses near the cattle dock by herding cattle therein. So in Rapier v. Tramways Co., (1893) 2 Ch. 588, it was 'held that, although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbors, and that it was no sufficient defense to say that they had taken all reasonable care to prevent it.' The obstruction of the passage to and egress from the warehouse and elevator in question by means of a permanent embankment, the storing of cars and other mere depot uses is not only in contravention of the express terms of the grant, but also of the mandate of the statute cited."

In Union Pacific Railroad Company v. Foley, (Col.) 35 Pac. Rep. 542, which was a similar case, it was held that plaintiff could recover for damages caused by such improper use of the street in front of his own property, unless he showed that the damages sustained by him by reason of such use

of other portions of the street were different in kind from those suffered by the public generally, who had occasion to use the street.

5. Damages by railroad crossing street upon an elevated incline, adjacent to, but not in front of plaintiff's property.—The owner of a house and lot abutting on a street cannot recover damages for interference with access thereto, caused by the construction of an elevated incline plane across the street on which it abuts, where such structure neither rests upon nor overhangs any part of the lot, either within or without the lines of the street. *Hartman v. Pittsburgh Inclined Plane Co.*, (Penn.) 28 Atl. Rep. 145.

6. Estoppel to claim damages.—Where a city consents to the construction of an elevated railroad in a street, the fee of which is owned by the city, a subsequent grantee of a lot owned by the city, and abutting on such street, cannot afterwards claim compensation for the appropriation of the easements appurtenant to the lot. *Herzog v. New York El. R. Co.*, 27 N. Y. S. 1034.

7. Measure and elements of damages — benefits.—Under Constitutions and statutes, which secure compensation to abutting owners, where a railroad is laid in the street in front of their property, the measure of the damages is such a sum as will make the owner whole—that is, the depreciation of the market value of the abutting property, caused by the railroad company laying their track and running their trains in the street. *Stewart v. Ohio River R. Co.*, (W. Va.) 18 S. E. Rep. 604. In such case, if the fair market value of the abutting property is as much immediately after the construction of the railroad as it was immediately before such improvement was made, no damages are sustained for which a recovery can be had. *Ibid.* To the same effect: *Nicks v. Chicago, etc., R. Co.*, 84 Iowa, 27, 50 N. W. Rep. 222; *Streyer v. Georgia, S. & F. R. Co.*, 90 Ga. 56; 15 S. E. Rep. 637.

In determining the question of damages and assessing the amount, the physical property (land and buildings) and the easement of access thereto from the street are not to be considered as having separate values, as if they were two different parcels of property, but are to be treated as parts of one and the same estate. Whether damage has been or will be done by the construction and use of the railroad depends upon whether the market value of the whole estate as one object of ownership has been or will be diminished by reason of devoting the street to this new use. *Streyer v. Georgia, S. & F. R. Co.*, 90 Ga. 56; 15 S. E. Rep. 637. Compare *Steubing v. New York El. R. Co.*, 138 N. Y. 658; 34 N. E. Rep. 369; *Sixth Ave. R. Co. v. Metropolitan El. R. Co.*, 138 N. Y. 548; 34 N. E. Rep. 548; *Saxton v. New York El. R. Co.*, 139 N. Y. 320; 34 N. E. Rep. 728.

In estimating benefits resulting from the construction and maintenance of an elevated railway, not only those peculiar to the premises, but also those shared with neighboring property, should be considered. *Saxton v. New York El. R. Co.*, 139 N. Y. 320, 34 N. E. Rep. 728.

8. Former notes and decisions.—*Dooly Block v. Salt Lake Rapid Tr. Co.*, 8 Am. R. R. & Corp. Rep. 327 and note; *White v. Manhattan R. Co.*, 8 Am. R. R. & Corp. Rep. 739, note; 7 Am. R. R. & Corp. Rep. 75, note 10; *Henry Gauss & Sons Mfg. Co. v. St. Louis, etc., R. Co.*, 7 Am. R. R. & Corp. Rep. 235 and note; *Sperb v. Metropolitan El. R. Co.*, 7 Am. R. R. & Corp. Rep. 554 and note; *Rafferty v. Central Traction Co.*, 6 Am. R. R. & Corp. Rep. 287. All prior notes and decisions are referred to in the note to the last case.

DAVIS v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1, December 23, 1893.)

1. **CHANGE OF STREET GRADE. LIABILITY OF MUNICIPALITY FOR DAMAGE TO ABUTTING PROPERTY.** Under Constitution of Missouri, article 2, section 21, prohibiting the taking or damaging of private property for public use without compensation, a city is liable for damages to property from a material change in the grade of a street from the natural surface.

2. **LIABILITY FOR DAMAGE TO IMPROVEMENTS MADE AFTER NEW GRADE ESTABLISHED.** A city is not, however, liable for damages from such change to improvements put on the property after the grade to which the change is made has been established and made a matter of record.

ACTION by Philip R. Davis against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant appeals.

R. T. Railey, for appellant. *T. B. Haughanout*, for respondent.

MACFARLANE, J. This action is for damages done to the plaintiff on account of grading by defendant of McGregor street, in the city of Carthage, in front of his property fronting on said street. The petition charged that plaintiff was the owner of lot 175, fronting on the east side of McGregor street, except a small portion thereof, which is described; that for the purpose of raising the grade of said street, in the year 1890, defendant constructed in said street, to its full width, and about eight feet high, in front of plaintiff's property, an embankment of a permanent character, which was done under a license granted defendant by the city of Carthage, a duly incorporated municipal corporation, by which his property was damaged \$500. The answer admitted the ownership of the lot, and that the west end thereof abuts on said street, and charged that the grade of McGregor street was duly established by an ordinance of said city in the year 1882, which was entered in the grade book of said city, and was a part of the public records of the city; that during the year 1890 defendant, being desirous of running a spur of its railroad across said street, south of plaintiff's lot, said city of Carthage, through its council, authorized it to do so, upon condition that it would raise the grade of the street up to that established by the city;

that defendant so constructed the grade by the direction and under the requirements of said city, and wholly for its benefit. Plaintiff replied that defendant agreed with the city of Carthage to repair the damage that might be done to the street in constructing its railroad across it, and pay all damage to property owners resulting therefrom. There were other issues made and tried, but no point is made on them, and they need not be considered.

On the trial it was shown from the charter and ordinances of the city of Carthage that it had power to "grade, pave or otherwise improve and keep in repair all roads, streets and bridges within the city limits, and that it did establish the grade of McGregor street in the year 1882. That by an ordinance duly passed and approved in 1890 the defendant was authorized to construct its road across said street, south of and adjoining the property of plaintiff, and other streets. Defendant was required, as a condition, to construct, erect and keep in repair suitable crossings or bridges at the intersection of its said railroad track with each and every one of said streets, and shall grade the approaches to such crossings or bridges on both sides of the track." The crossing of McGregor street was between Eldorado and Limestone streets, and on each side of the railroad crossing the natural surface of the ground was higher than at the point of crossing. The crossing of the street by the railroad was some thirteen feet below the natural surface of the ground, requiring a bridge above it for travel on the street. The bridge and its approaches were made in a careful and skillful manner on the established grades, which raised the street in front of plaintiff's property from two to six feet above the natural surface of the ground upon which plaintiff's improvements were made, as variously estimated by the witnesses. Plaintiff improved his property in 1884. Plaintiff offered evidence tending to prove that when he improved his property he had no knowledge that a grade had been fixed.

The court, of its own motion, gave the following instruction: "The court instructs the jury that if they believe from the evidence that the plaintiff, in 1890, was the owner of lot 175 in North Carthage, Jasper county, Missouri, except that part of said lot described in defendant's answer, which had theretofore

been sold to defendant, and that said lot and the part thereof so owned by plaintiff fronted on McGregor street, in the city of Carthage, and that defendant, in building its railroad across McGregor street, near said premises and lot, built the same below the grade of said McGregor street, and in constructing a bridge over and above its railroad, on said street, and approaches to said bridge, filled up said McGregor street, and raised the same in front of plaintiff's said lot, and damaged plaintiff's said lot, and depreciated the value thereof, then the jury should find the issue in favor of the plaintiff." Defendant asked, and the court refused to give, the following instruction: "If the jury believe from the evidence that the city of Carthage, through its council, in 1882, or prior thereto, established the grade of McGregor street; and that the work done by said defendant adjacent to said lot 175, upon said street, was done with the consent and by the direction of said city of Carthage; that said work was performed in a workmanlike manner, and simply made said street to conform to the grade established by said city aforesaid along said street and in front of plaintiff's said lot 175 — then the plaintiff is not entitled to recover in this action, and the jury should find for the defendant." The ruling of the court in giving and refusing these instructions sufficiently presents the only question submitted to us.

1. Is the owner of a lot fronting on a public street, entitled to consequential damages arising from the change of the natural surface of the street to a legally established grade? Neither the statute nor the charter of the city of Carthage nor its ordinances prescribed any rule for compensating the owner for the damages suffered in such cases, and it was well settled before the adoption of the Constitution of 1875 that a municipal corporation incurred no liability to the owner of a lot fronting upon a public street for damages resulting from a change of an established grade if the improvement was executed in a careful and skillful manner. *Van de Vere v. Kansas City*, 107 Mo. 83; 17 S. W. Rep. 695, and cases cited. The right then, if one exists, must be found under section 21, article 2, of the Constitution, which provides "that private property shall not be taken or damaged for public use without just compensation." Under that section it was declared, soon after the adoption of the Constitution, that "when property is damaged by

establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the Constitution." *Werth v. City of Springfield*, 78 Mo. 110. This declaration, though but a dictum in that case, has been quoted approvingly in subsequent cases. *Sheehy v. Railway Co.*, 94 Mo. 574; 7 S. W. Rep. 579; *Gibson v. Owens*, 115 Mo. 258; 21 S. W. Rep. 1109. In none of the cases cited was the question of changing the original surface of the street to an established grade involved, nor do we find that the exact question has ever been decided by this court. Judge Dillon, in his valuable work on *Municipal Corporations*, takes the position, which he supports with his usual fairness and ability, that a city would not, under such constitutional provision, be liable for such damages. His conclusion is expressed in the following language: "In view of these considerations it seems to us clear that for the original establishment of a grade line, and the reduction of the natural surface of the street for street purposes to such line, there is no legal right, or even natural equity, in the dedicator or his assigns to compensation." 2 *Dill. Mun. Corp.* §§ 995a, 995b. The learned author agreed that some of the decisions under the constitutional provision upon the exact point gave it a scope greater than the one he suggests. While the reasons given for the non-liability of the city in such cases have much force — indeed, are quite conclusive when applied to the larger cities of the country, which are enlarging their territory to accommodate their increasing population and business, and in which streets are generally graded — yet we do not think that the rule suggested would operate justly to property owners in towns and smaller cities in this state in which the necessity for such grading, or the ability to pay for it, may never arise. In municipalities of this class, in which most of the towns and cities of this state fall, the dedicator and his assigns should only be held to give implied assent to such improvements as would put the street in a condition for safe and reasonably convenient use upon or near the natural surface considering the peculiarities of the locality. If damages should be assessed in opening new streets, upon the theory, as claimed, that the city should, at any time thereafter, have the right, without further compensation, to raise or lower the grade as the convenience or necessity of the public might demand, the cost in

damages in many cases would virtually prohibit such improvements. In a majority of towns and cities of this state the natural surface is adopted and used by the public in making their improvements, as the street grade, and raising or lowering it to an artificial grade, might be more damaging than changing one artificial grade to another. If public convenience at any time requires the grading of a street, it is but just that the public should bear the burdens of having it done. We are of the opinion, therefore, that the rule which allows compensation for consequential damages to property, caused by a material change of grade from the natural surface, is the most equitable to the property owners, and best conserves the public interest, and this rule is generally adopted under similar constitutional provisions. *Harmon v. Omaha*, 17 Neb. 549; 23 N. W. Rep. 503; *City Council v. Townsend*, 80 Ala. 491; 2 South. Rep. 155; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Railroad Co. v. Williamson*, 45 Ark. 436; *Reardon v. City & County of San Francisco*, 66 Cal. 492; 6 Pac. Rep. 317; *City of Atlanta v. Green*, 67 Ga. 386; *City of Ft. Worth v. Howard*, (Tex. Civ. App.) 22 S. W. Rep. 1059.

2. Is a property owner entitled to consequential damages to his improvements thereon by reason of the city changing the street to a grade previously established? We think not. When the authorities of a city are of the opinion that the proper improvement of any of its streets may require that they should be graded, though the city may not, at the time, be in a condition to incur the expense, we think it would be entirely proper, in order to protect itself against increased damage and cost, that it should establish a grade to which subsequent improvement of adjacent property could be made to conform. If this is done, and the grade so established is made a matter of record ascertainable by property owners, they should be bound by it. The decisions of this court show that the constitutional provision is not broad enough to cover every possible damage that may result to a property owner from making public improvements. The damage has, in some cases, been limited to such as directly and especially affects the property itself, or some right or easement connected therewith. *Van de Vere v. Kansas City*, *supra*. To that extent

the common law has not been changed. Independent of the Constitution, the right of the city to change the grade of its street without liability to the owners of adjacent property is unquestioned. The ground of the doctrine is thus stated in a leading case: "Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increased population of a city may require, in order to render the passage to and from the several parts of it safe and convenient; and, as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. They are presumed to foresee the changes which public necessity or convenience may require." *Callender v. Marsh*, 1 Pick. 418. Now, while the Constitution intervenes and modifies the common-law rule so as not to require the owner to "calculate chances" of changes in the grade, it is not broad enough to allow compensation to one who knowingly, or without investigation, makes his improvements on a grade different from one previously established. *City of Denver v. Vernia*, 8 Col. 399; 8 Pac. Rep. 656; *Harmon v. Omaha*, 17 Neb. 549; 23 N. W. Rep. 503; *City Council v. Townsend*, supra. Plaintiff's damages should have been confined to that done the lot without reference to any improvements placed thereon after the grade had been established. Reversed and remanded. All concur, except Barclay, J., who is absent.*

EMINENT DOMAIN — CHANGE OF GRADE OF STREET.

1. Whether abutting owner entitled to damages when the change is from the natural surface to the first established grade.— Under the Constitution of Illinois providing that "private property shall not be taken or damaged for public use without just compensation," the owner of a city lot abutting on a street is entitled to recover damages from the city for injury to his property caused by grading the street, though the street has never been graded before. *City of Bloomington v. Pollock*, 141 Ill. 346; 31 N. E. Rep. 146. This accords with the principal case which has been approved by the Supreme Court of Missouri in banc in the case of *Hickman v. City of Kansas*, (Mo.) 25 S. W. Rep. 225.

2. What amounts to a change of grade.— In an action under Laws of New York, 1883, chapter 113, providing that whenever the grade of any street shall be changed so as to damage abutting real property, commissioners shall be appointed to assess the amount of the damage, it appeared that the year before the passage of the act the street in front of the property in question

* Reported in 24 S. W. Rep. 777.

was lowered, though not for its whole width, but an embankment ten feet wide was left at the original grade between the line of excavation and petitioner's property. Petitioner claimed damages for the removal of the embankment, which had been gradually drawn away during a number of years by the street commissioners, and by any one in the neighborhood who wanted a few loads of sand. Held, that this did not constitute a change or alteration in the grade within the meaning of the statute. *Whitmore v. Village of Tarrytown*, 137 N. Y. 409; 33 N. E. Rep. 489.

3. Whether damages to property on intersecting street can be recovered.— The fact that a street is raised above the grade of an intersecting street, so that vehicles can no longer pass from one to the other at that point, does not entitle a property holder owning adjoining, though separate, lots, on each street, to damages for the lots on the intersecting street, but only for the lots on the street abutting on the changed grade. *Lawrence v. City of Philadelphia*, 154 Penn. St. 20; 25 Atl. Rep. 1079.

4. Elements and measure of damages.— When city property is damaged by reason of the grading of the street upon which it abuts, the owner is entitled to remuneration. The difference in the market value of the property with the improvement and that without it, not considering general benefits shared by the general public, is the rule of compensation. In such case special benefits to the property directly attributable to the improvement may be set off against the damages sustained by the owner. *Lowe v. City of Omaha*, 33 Neb. 587; 50 N. W. Rep. 760. To same effect: *Stewart v. Council Bluffs*, 84 Iowa, 61; 50 N. W. Rep. 219. Where the grading of the street has been paid for in part by a special tax on the property in question, the measure of damages is the amount the property has been injured, less the benefits, if any, accruing to the property from grading the street, but from such benefits should be subtracted the sum paid as a special tax on the property. *City of Bloomington v. Pollock*, 141 Ill. 346; 31 N. E. Rep. 146. Under statutes of Connecticut providing that, where the abutting owner shall sustain special damage by a change of grade of highway, the borough making the change shall be liable therefor, an abutting owner can recover as special damages the value of a sidewalk previously constructed, and which was destroyed by the change of grade. *Shelton Co. v. Birmingham*, 62 Conn. 456; 26 Atl. Rep. 348. See S. C., 61 Conn. 518; 24 Atl. Rep. 978.

5. Effect of Constitution giving compensation for property damaged upon a change of grade ordered before but made after its adoption.— The Constitution of Illinois adopted in 1870 requires compensation to be made for property taken or damaged for public use; held, that section 1 of schedule providing that "all laws in force at the adoption of this Constitution not inconsistent therewith, and all rights, actions, prosecutions, claims and contracts of this state, individuals or bodies corporate shall continue to be valid as if this Constitution had not been adopted," does not authorize a city, which has, before the adoption of the Constitution, passed an ordinance fixing the grade of a street, to raise the street to such grade after the adoption of the Constitution, without making just compensation to the owners of abutting property. *City of Bloomington v. Pollock*, 141 Ill. 346; 31 N. E. Rep. 146.

SHAW V. DAVIS ET AL.

(Court of Appeals of Maryland, January 11, 1894.)

1. CORPORATIONS. JURISDICTION OF EQUITY TO INTERFERE WITH MANAGEMENT OF MAJORITY AT SUIT OF MINORITY OF STOCKHOLDERS. Equity will not interfere with the action of either the stockholders or directors of a corporation, in relation to its internal management, at the instance of a minority stockholder, where the acts complained of are neither fraudulent, illegal nor ultra vires.

2. WHERE SUIT RELATES TO DEALINGS WITH ANOTHER CORPORATION IN WHICH DEFENDANTS ARE ALSO MINORITY STOCKHOLDERS. The facts that the acts complained of relate to the dealings of such corporation with another corporation, and that the same persons are the officers and majority stockholders of both corporations, while plaintiff has no interest in the latter corporation, do not give the court jurisdiction.

3. BILL TO ENJOIN LEASE OF ONE RAILROAD BY ANOTHER WHEN DEFENDANTS ARE MAJORITY STOCKHOLDERS IN BOTH. A bill by a minority stockholder against the majority stockholders and officers of one railroad company, for an accounting of the dealings of such company with another railroad company, of which defendants are also the officers and majority stockholders, and to enjoin defendants from executing a permanent lease of the road of the latter company to the former, on the ground that such dealings will be to the great financial interest of the latter company, in which plaintiff has no interest, and to the disadvantage of the former company, is properly dismissed where no fraud is shown.

BILL by Alexander Shaw against Henry G. Davis and others for an accounting and an injunction. From a decree dissolving the temporary injunction and dismissing the bill, plaintiff appeals.

Charles Marshall, John L. Thomas, and W. Irvine Cross, for appellant. W. Pinckney Whyte, Bernard Carter, and Frank Wood, for appellees.

McSHERRY, J. We have given most patient and laborious study to the voluminous record now before us, as well as to the full and exhaustive briefs filed by the distinguished counsel who so ably argued the cause; and, after mature deliberation, we now proceed to state as concisely as possible the reasons upon which the conclusions we have reached are founded. The West Virginia Central and Pittsburg Railway Company was incorporated by the legislature of West Virginia with an authorized capital

stock of 60,000 shares of the par value of \$100 per share. Of these shares, when the pending bill of complaint was filed, 5,000 were held in trust for the company's treasury; 7,200 were owned by the appellant, Alexander Shaw; 2,600 by other members of his family; 30,194 by Henry G. Davis, Thomas R. Davis and Stephen B. Elkins, and their families; and the residue by Thomas F. Bayard, James G. Blaine, William Windom, William Keyser, and quite a number of other persons. The road extends from West Virginia Junction, near Piedmont, on the line of the Baltimore and Ohio railroad, in a southerly direction to Davis, in West Virginia, a distance of some fifty-eight miles. The company owns large tracts of coal and timber land, and is chiefly a coal and lumber carrying road. Its sole outlet was, originally, the Baltimore and Ohio railroad at West Virginia Junction. Not long after it began operations, it encountered serious difficulties with the Baltimore and Ohio, and, as described by Mr. William Keyser, it soon became apparent that the business of the West Virginia Central was largely diminished, and that it was greatly embarrassed by the lack of harmonious relations. In fact, the West Virginia Central property became almost sidetracked by the lack of facilities, the want of a cordial understanding, and its consequent inability to make contracts which it would be able to fulfill; and at last the necessity was forced upon this road to get another outlet, or accept the situation of being entirely bottled up. As a result of this condition, the Piedmont and Cumberland Railway Company was organized and incorporated, with a capital stock of 13,000 shares, for the construction of a road, parallel to the Baltimore and Ohio, from Piedmont to Cumberland. Of the capital stock Henry G. Davis, H. G. Davis & Bro. and Stephen B. Elkins hold 7,295 shares, the Pennsylvania Railroad Company holds 4,000 shares, and the residue is held in smaller lots by other persons — Mr. Shaw owning none of it. On May 21, 1886, a tripartite agreement was entered into between the West Virginia Central, the Piedmont and Cumberland and the Pennsylvania Railroad Companies, whereby the latter agreed to set apart five per cent of its receipts from traffic coming to its road from the West Virginia Central and going from its road to the latter, as a fund to guarantee the payment of the interest on the bonds of the Piedmont and Cumberland road,

which were to be issued to the extent of \$650,000, that the money might be thereby raised for the construction of the new road. The West Virginia Central agreed to deliver to the Piedmont and Cumberland all traffic it could control, and the Piedmont and Cumberland agreed to deliver to the Pennsylvania railroad one-half of all traffic hauled by it to Cumberland; and this agreement was ratified by the stockholders of the West Virginia Central, at a meeting in January, 1887, by a vote of 37,395 shares. With the money raised by the negotiations of these bonds, and by a call of a small installment of the stock subscribed, the Piedmont and Cumberland railroad was built. When finished, in August, 1887, it was operated by the West Virginia Central under a verbal agreement for sixty per cent of the gross earnings. Subsequently, and as will be stated more at large later on, the stockholders of the West Virginia Central appointed a committee to consider, and report at an adjourned meeting to be held on March 15, 1890, a permanent lease of the Piedmont and Cumberland road. On the fourteenth of March the appellant, Alexander Shaw, as a minority stockholder of the West Virginia Central, in behalf of himself and of other stockholders, who might come in and be made parties, filed the bill of complaint which inaugurated the pending litigation. The averments of the bill relate to two distinct and disconnected subjects. From paragraph 1 to and including paragraph 7 the bill is confined to a statement of transactions between the West Virginia Central on the one side, and Henry G. Davis, Thomas B. Davis and Stephen B. Elkins on the other, and these are introduced, apparently, for the purpose of showing the mode in which these majority stockholders dealt with the company in matters pertaining, not to this proceeding, but to something totally different. The remaining paragraphs of the bill have reference to transactions between the West Virginia Central and the Piedmont and Cumberland, and to the dealings of Henry G. Davis, Thomas B. Davis and Stephen B. Elkins, as officers and directors of these corporations, with the corporations themselves, and they may be briefly stated as follows: That Messrs. Davis and Elkins, having subscribed for a majority of the stock of the Piedmont and Cumberland road, gave value to their shares by the following process: (1) With a view of constructing a road that could be

cheaply built, they selected a location so low in the valley as to expose the road to heavy and destructive damages in times of floods in the Potomac ; that the road was in other respects defectively constructed, and that it is ruinously expensive to operate ; that it was designedly so constructed, with a view of having it operated by the West Virginia Central, and of throwing upon the latter company the heavy cost of operating it. (2) Before the Piedmont and Cumberland road was in a condition for the transportation of freight or passengers, the Messrs. Davis and Elkins used their official power in the West Virginia Central to make the latter company complete the construction of the Piedmont and Cumberland road, and, without authority from the stockholders of the West Virginia Central, they — the Messrs. Davis and Elkins — as officials of the two companies, made an arrangement by which the West Virginia Central Company began the operation of the Piedmont and Cumberland road in its incomplete condition, whereby the West Virginia Central was made to pay not only the ordinary cost of operation, but to complete the Piedmont and Cumberland road, and to put upon it betterments and improvements for the benefit of themselves as the principal stockholders therein. (3) While the Piedmont and Cumberland road was still a most precarious property, and sure to entail immense expense in its operation, the Messrs. Davis and Elkins determined, at the annual meeting in January, 1890, to risk the attempt to make the stockholders of the West Virginia Central ratify a permanent lease of the Piedmont and Cumberland road, which had been prepared and presented to the meeting ; and that the lease was most disadvantageous to the West Virginia Central, and most advantageous to the Piedmont and Cumberland Company ; and that the rate of earnings proposed in said lease as a compensation to the West Virginia Central was inadequate, and would be a fraud on the stockholders of that company. (4) When the lease was proposed to the stockholders, the plaintiff made a violent protest against any lease being executed until the accounts between the two companies should be first adjusted, without which adjustment the earning capacity of the Piedmont and Cumberland road, the expense incident to maintaining it, or a fair rate of rental could not be ascertained ; that the confused state of the accounts kept by the West Virginia Central ren-

ders any accurate statement impossible, and it would be a fraud on the stockholders of the West Virginia Central to have any lease made before a full settlement of these accounts between the two companies; that Messrs. Davis and Elkins consented to adjourn the stockholders' meeting until March 15, 1890, and that it is their design at that meeting to use the power which they have as the holders of the majority of the stock of the West Virginia Central to compel the ratification and acceptance of the lease, which they, as officers of the West Virginia Central, have agreed upon with themselves, as officers of the Piedmont and Cumberland Company. The prayers for relief are — *First*, for a discovery of the ownership of the stock of the Piedmont and Cumberland railway; *second*, for a discovery of the holdings of the stock of the Piedmont and Cumberland Company by the West Virginia Central Company, and the moneys spent by the latter company on the road of the first-named company; *third*, for an account as to how much money is due to the West Virginia Central by the Piedmont and Cumberland Company for advances made by the West Virginia Central on any account, and, particularly, on account of the completion of the Piedmont and Cumberland, which was paid by the West Virginia Central out of the sixty per cent operating expenses received under the verbal lease, and which ought to have been charged to the Piedmont and Cumberland and paid out of the forty per cent of the gross earnings received by it; and, *fourth*, for an injunction to restrain the execution of the proposed lease, or any other lease, until the court can ascertain what would be a proper apportionment of the earnings between the leased road and the operating road, and what, in a word, ought to be the terms, conditions and covenants of such a lease. An injunction as prayed was granted on March 14, 1890, and on April twenty-fourth the defendants answered, denying the material allegations of the bill, and moved for a dissolution of the injunction. A general replication was filed, and a large mass of evidence, covering nearly 1,000 printed pages, was taken. At the hearing the Circuit Court of Baltimore city on March 23, 1893, dissolved the injunction and dismissed the bill. From that decree this appeal was taken.

It will be observed at the threshold that the relief prayed for has no relation whatever to the first seven paragraphs of the bill,

and whether the averments contained therein be true or be false is purely a speculative question under the present structure of the bill of complaint. If those averments had been conceded by the answer to be true, relating as they do exclusively to alleged transactions between Messrs. Davis and Elkins and the West Virginia Central Company, it is not perceived how they could influence or affect, one way or the other, totally different transactions in no way connected with or dependent on them. No relief is sought as to anything averred in these seven paragraphs. The case, then, before us is that of a minority stockholder filing a bill in his own behalf, and in behalf of others who may subsequently join him, to restrain by injunction the majority stockholders of one railroad company from leasing, except with the leave of a court of equity, and upon the terms which it may prescribe, the road of another railway company, in which latter company the majority stockholders are the same persons who are the majority stockholders in the proposed lessee company; and also praying for an account between the two companies of antecedent financial transactions. Naturally the inquiries which such a case suggests at the very outset are: *First*, what jurisdiction has a court of equity to control the internal management of a corporation at the instance of a minority stockholder? and, *secondly*, in what manner does the circumstance that the majority of the stock is held by the same persons in both the companies affect the question of jurisdiction? And, *first*, it may be stated, as the result of all the authorities, that whenever any action of either directors or stockholders is relied on in a suit by a minority stockholder for the purpose of invoking the interposition of a court of equity, if the act complained of be neither ultra vires, fraudulent nor illegal, the court will refuse its intervention, because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interests may dictate, and their action will be binding on all, whether approved of by the minority or not. "In this country," said the late Mr. Justice Miller, in speaking for the Supreme Court of the United States in *Hawes v. Oakland*, 104 U. S. 450, "the cases outside the federal courts are not numerous and, while they admit the right of a stockholder to sue in

cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud, or a breach of trust, or are proceeding ultra vires." And so in *MacDougall v. Gardiner*, 1 Ch. Div. 14, James, L. J., said: "I think it is of the utmost importance in all these companies that the rule, which is well known in this court as the rule in *Mozley v. Alston*, 1 Phil. Ch. 790, and *Lord v. Miners Co.*, 2 Phil. Ch. 740, and *Foss v. Harbottle*, 2 Hare, 461, should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder in behalf of himself and others, unless there be something illegal, oppressive or fraudulent—unless there is something ultra vires on the part of the company, qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a great variety of things which a company may be well entitled to complain of, but which, as a matter of good sense, they do not think it right to make a subject of litigation; and it is the company as a company which will make anything that is wrong to the company the subject of litigation, or whether it will take steps to prevent the wrong being done. * * *. Everything in this bill, so far as I can see, if it is a wrong, is a wrong to the company. Whether it ought to have been done, or ought not to have been done, depends on whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the things should be done, or should not be done, or left unnoticed." In the same case Mellish, L. J., after observing that very often, in companies, things are done which ought not to be done, proceeds: "Now, if that gives a right to every member of the company to file a bill to have the question decided, then, if there happens to be a cantankerous member, or one member who loves litigation, everything of

this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, it will not go on. In my opinion, if the thing complained of is a thing which, in substance, the majority are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority has the right to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then, ultimately, the majority gets its wishes. Is it not better that the rule shall be adhered to that, if it is a thing which the majority are the masters of, the majority, in substance, shall be entitled to have their will followed? If it is a thing of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and this is what, as I understand, was decided by the cases of *Mozley v. Alston* and *Foss v. Harbottle*. In my opinion this is the rule to be maintained." See, also, *Gray v. Lewis*, 8 Ch. App. 1050.

Secondly. The fact that the same persons hold the majority of the stock in both companies does not, of itself, enlarge the court's jurisdiction. The act complained of furnishes the test of jurisdiction, and it must be ultra vires, fraudulent or illegal. Nothing short of this will suffice. This is true even in a case where directors, and not stockholders, do the act complained of. *Booth v. Robinson*, 55 Md. 441. And for stronger and more obvious reasons is it also true in a case where stockholders themselves act directly. They are not trustees or quasi trustees for each other. Even a director is not, strictly speaking, a trustee. *Spering's Appeal*, 71 Penn. St. 11; *Smith v. Anderson*, 15 Ch. Div. 247. In *Pender v. Lushington*, 6 Ch. Div. 70, Jessel, M. R., in speaking of the rights of a stockholder, said: "I cannot deprive him of his property, though he may not make use of the property in the way I approve. This is really the question, because, if these stockholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it, are entirely beside the question." Then, after referring to a decision by Mellish, the master of the rolls proceeded: "In other words, he (Mellish, J.) admits a man

may be actuated, in giving his vote as stockholder, by interests adverse to the interests of the company as a whole. He may think it was for his particular interest that a certain course may be taken which may be, in the opinion of others, adverse to the interests of the company as a whole; but he cannot be restrained from giving his vote in what way he pleases, because he is influenced by that motive. There is, if I may so say, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interests. This being so, the arguments which have been addressed to me, as to whether or not the votes which were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shows a want of appreciation of the principles on which this company was founded, appear to me to be wholly immaterial." And, in *Manhattan El. R. Co.'s Case*, 11 Daly, 516, the court says: "It is argued that, if common directors are disqualified from acting, so are common stockholders incapable to ratify agreements between their companies, and that the holder of one share of stock in each company could prevent any action at a stockholders' meeting relating to the two companies, no matter how advisable that action might seem to the holder of every other share. I do not say that the disqualification extends to a shareholder. I see no reason why it should. The disqualification rests entirely on the fiduciary relation. A shareholder is trustee for nobody. He has only his own interests to look after as such stockholder. Closely connected, undoubtedly, he is in practice with every other stockholder, but he holds no such fiduciary relation to the corporation as stockholder as he holds as director." *Beach Corp.* chap. 13, § 247.

Accepting these propositions as the fixed and settled law, it remains now to inquire whether the proof sustains the allegations of the bill, and brings the case within the legal principles to which reference has just been made. If the Messrs. Davis and Mr. Elkins selected, as alleged, an improper location for the Piedmont and Cumberland road, and improperly constructed that road, so

that it would be ruinous to operate it, and if they did this with a view of throwing the heavy cost of operating it on the West Virginia Central, it is difficult to assign a reason for such singular conduct. On its face the allegation is, to say the least, improbable. Those gentlemen owned over 30,000 shares of the 55,000 issued shares of the West Virginia Central Company, while they owned but 7,295 shares of the Piedmont and Cumberland road; and that they would purposely and designedly wreck their larger and more valuable holdings in the West Virginia Central merely for the purpose of realizing an income from a smaller and dependent road, in which their aggregate shares were not one-fourth of the amount owned by them in the main enterprise, is quite incomprehensible. Certainly, no motive for such a strange course has been shown. But, apart from the improbable character of the allegation, it is not supported by the evidence. The Piedmont and Cumberland road was located by an experienced and competent engineer, who was the chief assistant of the late J. N. Du Barry, at that time second vice-president of the Pennsylvania Railroad Company. He made a careful examination of the route of the proposed road, and selected, according to his testimony, the most suitable location that was available. He submitted his surveys and profiles to the engineering department of the Pennsylvania Railroad Company, and even laid them before Mr. George B. Roberts, the president of that company, and an engineer of high reputation, and they were fully approved by both. He testified that the grades were arranged as high as was deemed necessary to keep beyond the reach of extreme high water, and that, taking into consideration its location, alignments, its grades, and the mode in which it was built, the road, for economical operation, was equal to that of the Baltimore and Ohio. Besides this, it was proved by Mr. Charles H. Latrobe, an accomplished engineer in no way connected with or interested in this litigation, that he had made an examination of the Piedmont and Cumberland road, that its general alignment was good, that it had a very considerable proportion of long tangents, and not more than the usual amount of curvature, which might be reduced at very moderate expense, and that it was superior in this respect to the West Virginia Central, because rectifications of the line could be more readily made. As opposed to this, the record contains

the testimony of Mr. Wrenshaw, also an engineer, criticising the location and construction of the road. Though there is this difference of opinion between these engineers, and though, too, a freshet did some small amount of injury to the road in 1888, and an unprecedented flood in 1889 caused considerable damage to it, that might not have happened had the road been built higher above the Potomac river, still, we are not authorized to decide whether, in point of fact, the best location was selected that might have been selected, but only to determine from the evidence whether the location, as made, was made in good faith, or, on the contrary, with the fraudulent design imputed in the bill. We not only see nothing in the record to support this allegation of fraud, but, on the other hand, we are quite fully satisfied, after carefully considering the evidence, that the Piedmont and Cumberland railway was projected, located and constructed in entire good faith, with a view of furnishing a necessary outlet for the traffic of the West Virginia Central road, whereby the property of the latter company would be made valuable to its owners.

Now, as to the charge that, before the Piedmont and Cumberland road was in a fit condition for the transportation of freight and passengers, Messrs. Davis and Elkins used their powers as officers of the West Virginia Central to make that company complete the Piedmont and Cumberland, and that, without authority from the stockholders, but by virtue of their control over the West Virginia Central as majority stockholders, and in their capacity as officers of the two companies, they made an agreement under which the West Virginia Central undertook to operate the Piedmont and Cumberland upon such terms as would benefit themselves as stockholders of the Piedmont and Cumberland, and would permanently better and improve the latter road, to the detriment of the stockholders of the former road. There is no foundation in the evidence to support this accusation. The West Virginia Central began to operate the Piedmont and Cumberland in August, 1887; and while the road was then, as is necessarily the case, to a greater or less extent, with all newly-built railroads, less complete than it was made afterwards, yet, so far from its being unfit for the transportation of freight, it is in testimony by the superintendent that from that day up to the time he was examined as a witness there never had been a car derailed, or, as

he states it, there never had been a wheel off the track. He further testified that the road was well ballasted with stone, except in a few bottoms, where sand ballast was used, and that, when turned over to the West Virginia Central to be operated, it was superior to the condition of the Parkersburg branch of the Baltimore and Ohio when it was turned over to the latter company. Going no farther back than January, 1887, we find that Mr. Davis and the directors, among whom was the plaintiff, Mr. Shaw, stated, in the annual report to the stockholders of the West Virginia Central Company, that it would probably be found to the interest of the West Virginia Central to operate the Piedmont and Cumberland road, which was not then completed; and accordingly, at the meeting of the new board of directors, convened the next month, a resolution was adopted conferring upon the president, Mr. Henry G. Davis, full authority, with the advice and assistance of the company's counsel, the Hon. William Pinkney Whyte, to make such an agreement for the operation of the Piedmont and Cumberland road by the West Virginia Central, as he might deem best in the interest of the West Virginia Central, and directing him to report the result to the next stockholders' meeting. In January, 1888, Mr. Davis reported to the stockholders of the West Virginia Central, at their annual meeting, that no permanent arrangement had been made for the lease of the Piedmont and Cumberland road, but that the latter road was then being operated by the West Virginia Central for sixty per cent of the gross earnings of the new road. And this statement was repeated in the annual report made to the stockholders of the West Virginia Central in January, 1889. These reports of 1887, 1888 and 1889 were all unanimously adopted and approved by the stockholders of the West Virginia Central. This temporary arrangement, under which the West Virginia Central operated the Piedmont and Cumberland road up to the time of the filing of the bill, was, therefore, not made merely by the officers of the two companies, but its terms were known to, and fully and explicitly ratified and approved by, all the stockholders of the West Virginia Central who were present or represented at the annual meetings of 1887, 1888 and 1889, without dissent. At the annual meeting of the stockholders of the same company in 1890, where 54,268 shares out of the 55,000 issued shares were

represented in person or by proxy, a resolution was offered by one of the stockholders proposing to lease the Piedmont and Cumberland road, the lessee to pay all the costs and expenses of operating the road and to receive sixty per cent of the gross revenues, and accompanying the resolution was a draft of the proposed lease. A substitute was moved to the effect that the proposed lease be referred to the board of directors for examination, with a view that it might be determined whether its provisions would "promote and protect the interests of the company." Thereupon Governor Whyte proposed the following amendment, which was adopted without any dissenting vote, so far as the minutes disclose, though Mr. Shaw was present in person, viz.: "Resolved, That the lease proposed be referred to a committee of three stockholders, to report as to the propriety of its acceptance, to an adjourned meeting of the stockholders, and when this meeting adjourns, it shall be adjourned to the 15th day of March, 1890, at twelve m., at this place, when this subject shall be considered." On the fifteenth of March, when the meeting of stockholders reconvened, the committee appointed under Governor Whyte's resolution reported the form of a lease which they had prepared, varying somewhat the terms of the one proposed at the meeting in January, and recommended that the percentage of gross earnings to be paid to the West Virginia Central by the Piedmont and Cumberland should be sixty-three per cent instead of sixty per cent; but no action was taken by the stockholders, because the injunction applied for and issued the day previous was served before the meeting assembled. These facts demonstrably show the errors of the averment which charged that the Messrs. Davis and Elkins designed to use the power which they held as owners of a majority of the West Virginia Central's stock to compel the ratification and acceptance of a lease which they, as officers of the West Virginia Central, had agreed on with themselves, as officers of the Piedmont and Cumberland road.

We come now to the averment that large sums of money, expended on account of construction of the Piedmont and Cumberland road after August 1, 1887, were improperly charged to the West Virginia Central, and improperly paid by it out of the sixty per cent of gross earnings received by it for operating the

Piedmont and Cumberland road, while they should have been charged to the Piedmont and Cumberland, and should have been paid out of its forty per cent of those earnings. The total aggregate of these alleged erroneous charges, as calculated by Maj. Buckley, an expert accountant produced by the plaintiff, is the sum of \$32,248, and, without pausing to examine the lengthy statement item by item, we will assume that the aggregate amount was improvidently charged to the West Virginia Central, and that upon a strictly technical system of accounting the whole of this should have been paid by the Piedmont and Cumberland Company; but still the material question recurs, was the charge of this sum to the West Virginia Central, as made, made merely in error, or in bad faith, or fraudulently? If made in good faith, though inaccurately made, a court of equity has no jurisdiction, at the suit of a stockholder, to readjust the account. Under such conditions, the company injuriously affected must itself seek the appropriate redress. Courts cannot intervene, in the absence of fraud or illegality, or where the act is not ultra vires, to control, manage or regulate corporate business. The question of ultra vires has nothing to do with this branch of the case. The leasing of the one road by the other was perfectly lawful, and a mere dispute as to the method of keeping certain of the accounts between them could not raise an issue of ultra vires, especially when there is no unvarying, fixed or unbending system controlling the classification of items in such an account as this. But the evidence signally fails to show any fraud whatever in this transaction. It is often a debatable matter whether particular items ought to be charged to operating expenses or to construction account. Different accountants may honestly disagree as to which of the two accounts a given item should be charged. Necessarily, then, some officer of the lessee company must, in the first instance, decide the question. If he decides wrongly, it does not follow that he has decided wrongfully or fraudulently. This is made perfectly clear by Mr. Keyser in his intelligent testimony, from which we now quote briefly: "Taking the two accounts together and looking at them from all the light that I can get, I should say the president of the West Virginia Central and Pittsburg Railway Company had dealt liberally by the Piedmont and Cum-

berland road in his method of charging these accounts. If the system of an accountant was to be adopted, and every item charged upon the strict basis of a construction account, I think the carrying out of that principle would eliminate a large amount of these charges against the Piedmont and Cumberland road growing out of the flood. In other words, I cannot see how the president could be tied down to any strictly-defined method of accounting that would enable him to accept, on the one side, Mr. Bulkley's accounts, and, on the other side, justify him in his method of charging the Piedmont and Cumberland road with these large items of practical repairs—because that is what they were—growing out of an unusual and disastrous flood. * * * I think the discretion in a case of this kind should be placed in the hands of the president, in the absence of anything which binds it down by any definite rule, as adopted by the two companies. * * * I think, in this case, and I speak now as a stockholder in the West Virginia Central road, that, looking at these accounts, and looking at the lease as I did when I was on the committee, and in the absence of anything in the way of a definite, clear provision for this business between the two companies, that the matter of stating the accounts has been a fair one on the part of the president, and if I were to criticise it at all I should say he leaned against the interests of the Piedmont and Cumberland railroad in charging rather too much.” But there is still another view of the subject. While President Davis charged up this sum of \$32,248 to the West Virginia Central, he charged to the Piedmont and Cumberland a much larger sum for other and different expenses, which ought to have been paid by the West Virginia Central, and, therefore, whatever error he made in the first instance was more than counterbalanced by the subsequent error against the Piedmont and Cumberland road. There is one other account alluded to, which may be disposed of in a very few words. There is an allegation that there is money due by the Piedmont and Cumberland for advances made to it by the West Virginia Central for original construction, and growing out of other dealings since. The evidence, however, shows that it is the West Virginia Central which is indebted to the Piedmont and Cumberland.

What we have said in considering the subjects just discussed

applies equally to so much of the prayer of the bill as relates to the relief sought by way of account; and, without repetition, we need only add that the plaintiff has failed to support by evidence the averments upon which the jurisdiction to grant that particular relief depends. There is no pretense that the two companies had not the necessary powers, under their charters and under the laws, to enter into the business relations out of which these questions of account arose. The transactions themselves were not illegal, and, however erroneous the accounts may be conceded to be, when considered from the standpoint of a professional accountant, there has been literally nothing adduced to show that the alleged errors were fraudulently or designedly committed, with a view of benefiting the stockholders of the Piedmont and Cumberland Company at the expense of the stockholders of the West Virginia Central Company. Nor does the making of a lease by the Piedmont and Cumberland road to the West Virginia Central Company necessarily depend upon the state of antecedent accounts between the two companies. Whatever unadjusted or erroneously adjusted accounts there may be can as readily be balanced and settled after, as before, a lease has been executed. And if the proposed lease be not ultra vires or unlawful or fraudulent, no court, at the instance of a minority stockholder, or at the instance of any one else, has the power or the right to restrain the majority from dealing with the property as they may deem most advantageous to their own interests. Any other doctrine would put it in the power of a single stockholder, owning but one share out of many hundreds, to transfer the entire management of a corporation to a court of equity, and would effectually destroy the right of the owners of the property to lawfully control it themselves. It would make a court of equity practically the guardian, so to speak, of such a corporation, and would substitute the chancellor's belief as to what contracts a corporation ought, as a matter of expediency, or policy, or business venture, to make, instead of allowing such questions to be settled by the persons beneficially interested in the property. No such arbitrary or dangerous power has ever been claimed by any court, and, if laid claim to, it would never be tolerated in a free government. The injunction granted on March 14, 1890, prohibited the making of a lease upon the terms of sixty per cent of the gross earnings,

or any other lease, until the further order of the court. Apart from all questions of ultra vires, illegality and fraud, this power, thus assumed, undertook to reserve to the court the authority to prescribe the terms of any lease, because it prohibited the making of any lease without the court's leave. When the terms are not agreed to, the conditions not named, and the covenants not formulated, what authority exists in the chancellor to assume in advance that an act ultra vires, or that fraud or illegality will be attempted? In the case at bar the lease which was actually prepared under the circumstances we have already stated at large—which are a flat negation of any fraud or secrecy—made no provision for a sixty per cent, but for a sixty-three per cent, proportion of the gross earnings, and there is nothing to show, even if we had the right to go into an examination of the subject, that such a proportion of the gross earnings would be an unfair or inadequate rental. As the court had no power to decree a lease, so it had no power to prescribe the terms of one. It could prohibit the doing of an act ultra vires, illegal or fraudulent. Beyond that it could not go. As no such act was before it, it did right in dissolving the injunction and in dismissing the bill. For the reasons we have given we will affirm the decree appealed from. Decree affirmed, with costs above and below.*

Corporations — when the minority of stockholders may have relief against the acts or management of the majority.—Individual stockholders cannot question, in judicial proceedings, the corporate acts of directors, if the same are within the powers of the corporation, and in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith, and in the exercise of an honest judgment. Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests—are left solely to the honest decision of the directors, if their powers are without limitation, and free from restraint. *Ellerman v. Chicago Junction Railways & Union Stock-yards Co.*, 49 N. J. Eq. 217; 23 Atl. Rep. 287. See, also, *Willoughby v. Same*, 50 N. J. Eq. 656; 25 Atl. Rep. 277.

Where a majority of the stockholders have combined to so manage the business of the corporation as to divert all the profits of the enterprise from their legitimate destination, and to appropriate them to their own use and have in part executed their plan, and the circumstances render any change in the personnel of the management impracticable, a proper case has arisen for the

* Reported in 28 Atl. Rep. 619.

intervention of the court to make a division of the assets. *Fowgeroy v. Cord*, 50 N. J. Eq. 185 ; 24 Atl. Rep. 499. See, to the same effect, *Miner v. Belle Isle Ice Co.*, 6 Am. R. R. & Corp. Rep. 660.

The secretary and one of the stockholders of a corporation whose business was unprofitable secretly agreed to purchase all the stock and the property of the corporation. Accordingly, they purchased, in the names of third parties, all the stock, except that of complainant, who held a little more than one-third of the stock. A resolution was passed, against complainant's vote, authorizing the president and secretary to sell all the corporate property, which they accordingly sold to a nominal purchaser for the benefit of the secretary and said stockholder. Held, that said sale might be set aside as in fraud of complainant's rights. *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320 ; 30 N. E. Rep. 667. It being shown that the directors were under the control of the said stockholder, complainant had a right to bring suit in his own name to set aside such sale without first demanding that the corporation bring such suit. *Ibid.*

A complaint which alleges that plaintiffs and defendants are stockholders in a corporation ; that the directors are the "implements and representatives" of defendants, who own a majority of the stock ; and that the directors conveyed to defendants land of the corporation at one-tenth of its real value, in fraud of the other stockholders — states facts constituting actual fraud, and is sufficient on demurrer. *Woodroof v. Howes*, 88 Cal. 184 ; 26 Pac. Rep. 111.

PHILLIPS V. MERCANTILE NAT. BANK OF CITY OF NEW YORK.

(Court of Appeals of New York, January 16, 1894.)

1. **BANKS AND BANKING. LIABILITY AS TO FRAUDULENT CHECKS DRAWN BY CASHIER.** A bank is bound by the act of its cashier in drawing checks in its name, though with the intent of embezzling the proceeds, and payment of the checks by the drawee is binding on the bank.

2. **EFFECT OF FRAUDULENT CHECKS MADE TO ORDER OF FICTITIOUS PERSON AND INDORSED.** Checks drawn by the cashier of a bank, payable to fictitious persons, whose names he indorses thereon, are in effect payable to bearer, and payment of such checks by the drawee is binding on the bank, as, in transmitting them made and indorsed, the bank is so far concluded by his acts as to be estopped from denying their validity.

4. **CHECKS TO THE ORDER OF A REAL PERSON BUT NOT INTENDED FOR DELIVERY TO SUCH PERSON ARE IN EFFECT PAYABLE TO A FICTITIOUS PERSON.** The fact that the payees in the checks, whose names were indorsed thereon by the cashier, were customers of the bank, does not vary the rule applicable to fictitious payees, where the cashier did not intend to deliver the paper to the customers, as the fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name.

ACTION by John E. Phillips, as receiver of the National Bank of Sumter, S. C., against the Mercantile National Bank of the city of New York. From a judgment of the General Term (22 N. Y. Supp. 254) affirming a judgment at Circuit dismissing the complaint, plaintiff appeals.

Wingate & Cullen (Geo. W. Wingate, of counsel), for appellant. *Chas. A. Davison* (John M. Bowers, of counsel), for respondent.

GRAY, J. The plaintiff is the receiver of the National Bank of Sumter, in South Carolina, and through this action seeks to recover a balance alleged to be due on a deposit account with the defendant bank. The question presented by the record is whether certain twelve checks, drawn by the cashier of the Sumter bank, which were paid by the defendant bank, could properly be debited in account to the Sumter bank. Bartlett, its cashier, had drawn them upon the defendant for various amounts, some to the order of A. S. Brown and some to the order of C. E. Stubbs. In the check book he would enter sometimes the real amount of the checks, and sometimes an amount much less than the checks actually were drawn for. The names of these payees were those of persons who actually resided in Sumter, and were dealers with the bank, but they knew nothing of these checks, and had no connection whatever with the transactions of the cashier in issuing these checks. Bartlett, after having drawn the checks, indorsed them in the name of the payee, making them payable to the order of some firm of stock brokers in New York, who collected them from the defendant. By subsequent manipulations of the books in his bank, Bartlett was able to prevent a discovery of his dishonest acts until after he had absconded, and the insolvency of the bank was disclosed. The learned trial judge, in dismissing the complaint, discussed the question of what the act of the cashier of the Sumter bank amounted to in law. In his judgment, the cashier's indorsement of the checks in the name of the payee which he had written in the body of the check was not, in a legal sense, forgery. He said that act did not defraud the persons whose names were used as payees, nor the bank of New York, nor his own bank, but that the fraud con-

sisted in the unlawful drawing of the check for his own purposes, with the intent to convert his own bank's funds. Regarding the transaction in that light, and the indorsement as a part of one continuous act of preparing a check so that the New York bank should pay the funds drawn upon to the indorsees, he very properly reached the conclusion that, so far as the New York bank was concerned, the cashier's intent was the intent of his bank, and hence the payment of the checks was conclusive upon it. At the General Term, the opinion of the court again carefully reviews the legal questions, and sustains the judgment below. Upon the question of the effect upon the transaction of the use by Bartlett of names, as payees, of persons who were customers of the bank, it is said in the opinion that that fact did not prevent the application of the principle which would govern if fictitious names had been selected and used for payees. They held, in substance, that the bank, through its authorized officer, had put in circulation paper with knowledge, chargeable to it, that the names of the payees did not represent real persons, and with the intention to indorse thereon the names of the payees, who, for all intents and purposes, were fictitious payees, and whose names were adopted and resorted to as a device to avoid suspicion.

We think the judgments below were right. Whether indorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant. *Coggill v. Bank*, 1 N. Y. 113. In the case cited, a bill was drawn upon the plaintiff to the order of one Truman Billings, and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings, a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. Bronson, J., said: "As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that, when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer."

The case of *Shipman v. Bank*, 126 N. Y. 318; 27 N. E. Rep. 371, which was recently before us, did not decide any question inconsistently with what the courts below have decided. There it had been found that the checks were signed by the firm in the belief that the names of the payees represented real persons entitled to receive the amounts of the checks, and with the intention that they should be delivered to real payees, and should not go into circulation otherwise than through a delivery to, and an indorsement by, the payees named. Bedell was their clerk, whose employment did not comprehend the drawing or indorsing of checks or drafts, and in indorsing upon the checks the names of the payees he committed the crime of forgery, because he was without authority in that respect, and did so with the intention to deceive his employers, the makers, and to put their checks in circulation for his account. That was a case wholly other than was made out here. It was stated in the *Shipman* case that the maker's intention is the controlling consideration which determines the character of the paper, and that the statutory rule which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that, by the methods resorted to, he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon it. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is mani-

fest. As cashier, invested with the authority to draw checks upon the bank's accounts with its correspondents, instead of drawing them directly to the order of the parties who he intended should get the moneys, he drew them to the order of persons who had no interest in them, and thereupon wrote their names under a direction to pay to the real parties, who were intended to be the recipients of the funds drawn upon. If the checks had been drawn directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law, and the only real parties were the firms in New York, to whom the cashier sent them in such form as that they could draw the moneys upon them. The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the power confided to him for exercise, was enabled to perpetrate a fraud upon his bank which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers. It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature, but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In

transmitting them made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity. For the reasons given the judgment should be affirmed, with costs. All concur, except Bartlett, J., not sitting.*

BANKS AND BANKING — RECENT DECISIONS.

1. Deposits and depositors.— *The contract implied.*— The contract arising by the implication of law from a deposit of money in a bank is that the bank will, whenever required, pay out the money in such sums and to such persons as the depositor shall designate by his checks. Board of Chosen Freeholders v. Newark City Nat. Bank, 48 N. J. Eq. 51 ; 21 Atl. Rep. 185.

Whether deposit general or special.— Plaintiff delivered money to a banker, her representative stating to him that she wished to leave it with him until he could invest it. He made out a savings deposit ticket in her representative's presence, and gave her a pass book, containing rules and regulations, showing the opening of an account between herself and the bank ; and the transaction was entered in his books as other savings accounts. Held, that the deposit was a general and not a specific one. Wetherell v. O'Brien, 140 Ill. 146 ; 29 N. E. Rep. 904. Money deposited with a private banker to secure him from liability on a bond, and mingled by him with the other funds of the bank, with the knowledge of the depositor, though evidenced by a certificate of deposit stating the object for which it is made, is a general, and not a special, deposit, and passes to the banker's assignee, under a general assignment. Mutual Acc. Ass. v. Jacobs, 141 Ill. 261 ; 31 N. E. Rep. 414.

Mistake of bank in charging check — suit for balance — lapse of time.— Where plaintiff, in 1868, drew a check on defendant's bank, in writing, for \$900, but set forth "\$1,900" in figures in one corner, and about four weeks thereafter defendant charged the check at \$1,900 in plaintiff's book, and returned the book and check to him, the fact that plaintiff did not discover the mistake and bring suit until 1889 does not create an estoppel in pais, it appearing that defendant kept books of account, which should have disclosed the transaction at once, has used the money, and has not been put to any material disadvantage by the delay. Goodell v. Brandon Nat. Bank, 63 Vt. 303 ; 21 Atl. Rep. 956. Where plaintiff closed his account with defendant in 1878, and drew his check for the balance then standing to his credit, such check is a demand only for the amount named therein, and not for the \$1,000, and the statute does not begin to run from such time. Ibid.

Trust funds.— Though it is known that the money deposited is held by the depositor as a trustee, the bank is bound to presume, in the absence of knowledge to the contrary, that a check drawn by the depositor against the money has been drawn by him in the proper discharge of his duty as trustee, and to pay the check accordingly. Board of Chosen Freeholders v. Newark City Nat. Bank, 48 N. J. Eq. 51 ; 21 Atl. Rep. 185. It is not a conversion for the trustee to deposit trust money in bank to his credit as agent, though the bank may have knowledge of the trust, and payment by the bank to the trustee on his checks will discharge it, whether such checks be signed with or

* Reported in 140 N. Y. 556; 35 N. E. Rep. 982.

without the designation of trustee. *Munnderlyn v. Augusta Savings Bank*, 88 Ga. 333; 14 S. E. Rep. 554. Such moneys may be sued for by the trustee in his own name. *Ibid*.

L. sold a consignment of fresh meat for plaintiff, and deposited the proceeds in bank in his own name. L. testified that he informed the cashier that the money belonged to plaintiff, and directed him to remit the same to plaintiff, and that the cashier wrote the word "meat" opposite the entry in L.'s pass book, to show the character of the deposit. The bank applied the deposit to L.'s overdrafts. Held, in an action against the bank to recover the deposit, that the court erred in instructing the jury to find for defendant. *Armour-Cudahy Packing Co. v. First Nat. Bank*, 69 Miss. 700; 11 South. Rep. 28.

It appeared by the bill that respondent, a public corporation, had made deposits of public money, belonging to it, in a bank; that such deposits were made in the name of the county collector, as such, but by respondent's directions were withdrawn only by checks signed by the county collector for the time being, and countersigned by the auditor of the county; that a balance of deposits stood on the books of the bank in the name of Joseph S. Smith, collector; but that Smith had ceased to be collector and had been succeeded by Regan. Upon demurrer to the bill, held that Smith had no control over or interest in such balance, but that respondent had an action at law to recover the same if the bank refused to pay a check therefor, signed by Regan as collector, and countersigned by the then auditor, which action would afford a complete and adequate remedy to it. *Depue, Knapp and Smith, JJ., dissenting*. 21 Atl. Rep. 185, reversed. *Smith v. Chosen Freeholders*, 48 N. J. Eq. 627; 23 Atl. Rep. 268.

2. Effect of bank crediting check drawn on itself.—A bank which receives from a depositor a check drawn on itself by another person, and gives the depositor credit therefor, thereby pays the check, and cannot afterwards deduct the amount of such check from the depositor's account without his consent. *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596; 28 N. E. Rep. 839.

3. Checks and drafts.—Where the payee of a bank check has it certified by the bank he thereby releases the drawer from liability thereon. *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 27 N. E. Rep. 533; *Minot v. Russ*, 156 Mass. 458; 31 N. E. Rep. 489. Where a bank upon which a check is drawn fails before payment thereof, though it is presented in due season, and the drawer of the check in his own behalf, or for his own benefit, had the check certified before delivering it to the payee, he is not discharged from liability on the check. *Minot v. Russ*, 156 Mass. 458; 31 N. E. Rep. 489.

Where the drawer of checks had no funds in the hands of the bank, and knew they would not be paid if presented, it was not necessary, before commencing action on the checks, to present them to the bank for payment. *Beauregard v. Knowlton*, 156 Mass. 395; 31 N. E. Rep. 389.

A bank cannot refuse to cash a check, though it knows that the check was drawn in payment of a bet made in violation of law on the result of an election; and the fact that a check was so cashed is not ground on which the drawer can recover the amount from the bank. *McCord v. California Nat. Bank*, 96 Cal. 197; 31 Pac. Rep. 51.

Where the parties so agree, a check may be given and received in absolute discharge of a debt, and whether it was so given and received is a question of fact, to be determined from the evidence. *National Park Bank v. Levy*, 17 R. I. 746; 24 Atl. Rep. 777. Where the payee of a check deposits it in bank, and, according to a custom assented to by him it is credited on his bank book as so much cash, the title to the check vests in the bank, and the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check was given. *Ibid.*

One who receives from an agent payment of the agent's debt out of funds belonging to his principal is liable to the principal therefor, where such payment was unauthorized, even though the payment was received in good faith without actual knowledge of the agent's want of authority. *Gerard v. McCormick*, 130 N. Y. 261; 29 N. E. Rep. 115. The fact that a drawer of a check adds to his signature the words, "Agt. Glass Buildings," is sufficient to put the payee on inquiry as to the ownership of the fund drawn on. *Ibid.* See, also, *Kissam v. Anderson*, 145 U. S. 435; 12 Sup. Ct. Rep. 960.

Whether the title to a check deposited with a bank passes to the bank before collection, so as to immediately create the relation of debtor and creditor between it and the depositor, is a question of fact, depending upon the circumstances and course of dealing in each particular case. *City of Somerville v. Buel*, 49 Fed. Rep. 790.

As to what amounts to due diligence in presenting checks, see *Nebraska Nat. Bank v. Logan*, 29 Neb. 278; 45 N. W. Rep. 459; 35 Neb. 182; 52 N. W. Rep. 808.

The payee of a draft deposited it in his bank, which immediately forwarded it, "for collection," to its correspondent bank, at the residence of the drawee, who directed that the draft be taken to his bank for payment. The drawee's bank took the draft and charged it to the account, and canceled it, but no money was passed in the transaction. In the customary settlement of that day between these two banks, the correspondent was charged by the drawee's bank with the amount of checks and drafts held by it in excess of the amount held against it by the correspondent, and the correspondent credited the payee's bank with the amount of the draft, but never remitted or otherwise paid it. Both banks failed. Held, that the transaction in which the draft was settled was a collection, and was binding on the payee, as against the drawee. *Howard v. Walker*, 92 Tenn. 457; 21 S. W. Rep. 897.

4. Certificates of deposit.—The certificate of a bank, showing that a certain person had deposited therein so many dollars "in checks," payable to the order of himself, does not show a promise to pay the amount specified in money, and is not negotiable. *Gaines, J., dissenting. First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40; 19 S. W. Rep. 334. The payee of a certificate of deposit, who has not the possession, and who confesses his inability to surrender it on payment, cannot recover against the bank when it appears by his own showing that the paper is not lost, but is in the hands of another, though wrongfully, who produces it on the trial but refuses to surrender it, and claims title to it in hostility to the payee. *Read v. Marine Bank*, 136 N. Y. 454; 32 N. E. Rep. 1003.

A bona fide purchaser of a negotiable certificate of deposit for value, before maturity, without notice of equities, is protected to the same extent as an

innocent holder of other negotiable paper. But if such certificate is transferred when overdue the purchaser takes it subject to all defenses which could have been made had it remained in the hands of the payee. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71; 51 N. W. Rep. 305. Across the face of a certificate of deposit in the usual form, payable to the order of the payee on the return of the certificate properly indorsed, were stamped the words: "This certificate payable three months after date, with 6 per cent interest per annum for the time specified." The instrument was transferred by the payee more than three months after its date. Held to be a time certificate and dishonored when sold. *Ibid.*

Where a bank is in the hands of a receiver, a certificate of deposit, payable on its return to the bank, must be presented to the receiver in order to fix the liability of an individual who has signed it. *Ballard v. Burton*, 64 Vt. 387; 24 Atl. Rep. 769.

5. Collections.—*Presumed assent to customs of bankers.*—Where a payee of a draft selects a bank as his collecting agent, he is presumed to know the methods by which such transactions are effected through banking customs, and actual ignorance of them is of no avail as an excuse. *Howard v. Walker*, 92 Tenn. 457; 21 S. W. Rep. 897. A person sending paper to a bank for collection, without special instructions, is bound by a custom of the bank to hold paper sent to it for collection for some days after presenting it and receiving a promise of payment, if such usage is not in violation of the general law. *Sahlien v. Bank of Lonoke*, 90 Tenn. 221; 16 S. W. Rep. 373. To same effect, *First Nat. Bank v. Sprague*, 34 Neb. 818; 51 N. W. Rep. 846.

Negligence of collecting bank.—In an action against a bank for negligence in failing to collect a draft sent to it for collection, the burden is on plaintiff to show that the drawee was solvent and the draft collectible. *Sahlien v. Bank of Lonoke*, 90 Tenn. 221; 16 S. W. Rep. 373. The fact that a bank, after receiving a draft for collection, and after presenting it for payment, and receiving a promise of payment, holds the same, according to its customary method of business, for ten days, without notice to the drawer, during which time the drawee makes an assignment, does not, of itself, constitute such negligence as will entitle the drawer to recover from the bank. *Ibid.*

A bank receiving a certificate of deposit for collection and mailing it to the bank which first issued it, with a request for a remittance, is guilty of negligence. *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. Rep. 967; 6 C. C. A. 183. But see *Nebraska Nat. Bank v. Logan*, 35 Neb. 182; 52 N. W. Rep. 808.

The E. bank on May 8, 1888, mailed to the L. bank for collection a certificate of deposit issued by P. & Co. On May ninth the L. bank received the certificate, and negligently mailed it directly to P. & Co., with a request to remit. On June first the L. bank credited the E. bank with the item in the account current for May, and wrote that nothing had been heard from P. & Co. after repeated inquiries, and requested that the matter be investigated, and a duplicate or a remittance obtained from P. & Co. On June twenty-second, having received no answer to this letter, the L. bank wrote the E. bank that repeated letters about the item had remained unanswered; that the L. bank had written the E. bank for a duplicate, and that the L. bank now charged the E. bank with the item, which was accordingly done in the account

current for June. No further correspondence was had on the subject, and thereafter the item was omitted from the monthly accounts current. P. & Co. continued in good credit until after January 1, 1889, when they failed. Held, that the facts showed a renunciation of agency by the L. bank, and that the renunciation was acquiesced in by the E. bank, and that the E. bank was entitled to only nominal damages. *First Nat. Bank v. Fourth Nat. Bank*, 6 C. C. A. 183; 56 Fed. Rep. 967.

Plaintiff drew a draft, "without protest," on his debtor, payable at sight, and inclosed it to defendant bank for collection, without instruction as to presentment. The drawee lived in the country, some distance from the bank, which on the day of the receipt of the draft notified him by mail, as was the custom of the banks in the place, unless specially instructed. A week later the drawee called at the bank, said he would pay the draft the next week, and accepted it. On the same day plaintiff was notified by letter that the draft was payable the following week, and later he sent his clerk to inquire about it. No further instructions were given, and, a few days afterwards, plaintiff wrote asking if the drawee had made arrangements for payment, thus recognizing what the bank had done. About two weeks after accepting the draft the drawee made an assignment for the benefit of creditors. Held, that defendant was not guilty of negligence in presenting the draft for payment, or in failing to make proper efforts to collect it after acceptance. *Crouse v. First Nat. Bank*, 137 N. Y. 383; 33 N. E. Rep. 30.

Where a bank receives a draft for collection it has no right to delay presentment in order to obtain security for a debt of its own from the drawee. *Finch v. Karste*, 97 Mich. 20; 56 N. W. Rep. 123.

6. Whether bank responsible for negligence of sub agents.—Where a bank receives for collection a note or bill payable at a distant point, with the understanding that such collection is an accommodation only, or that it shall receive no compensation therefor beyond the customary exchange, and transmits such paper to a reputable and suitable correspondent at the place of payment, with proper instructions for the collection and remittance of the proceeds thereof, it will not be liable for the defaults of such correspondent. *First Nat. Bank v. Sprague*, 34 Neb. 318; 51 N. W. Rep. 846. In such case the holder will be held to have assented to the employment in his behalf of such agents as are usually selected by banks in the course of business in making collections through correspondents, and the correspondent so selected will, in the absence of negligence by the immediate agents and servants of the transmitting bank, become the agent of the holder only. *Ibid.*

7. Right of owner of draft to recover proceeds in hands of sub-agent.—A bank which had received a draft for collection sent it to its correspondent bank at the residence of the drawee, and the draft was paid to such correspondent. There were no mutual accounts between the two banks, but it was the custom of the correspondent to remit the proceeds of collections at stated periods. Held that, until this remittance was made, or the principal bank had given the original owner of the draft credit for the avails, the original owner of the draft, as the owner of the proceeds thereof, was entitled to recover them from the correspondent bank. *National Exch. Bank v. Beal*, 50 Fed. Rep. 355.

8. Right of creditor of owner to attach proceeds in hands of sub-agent.— Generally the payee of a bill of exchange, by indorsing it (otherwise in blank) "For deposit to the credit of" himself, retains ownership not only of the bill, but of its proceeds, until they are so deposited. The money realized by collecting the bill is, in the hands of a disinterested bank, through whose agency the collection was made, subject to garnishment as assets belonging to such indorser. *Freeman v. Exchange Bank*, 87 Ga. 45; 13 S. E. Rep. 160.

9. Collections—insolvency of collecting bank—whether paper deposited for collection or the proceeds thereof is a trust fund.— A Cincinnati bank wrote to a Philadelphia bank: "Will collect at par all points west of Pennsylvania, and remit the 1st, 11th and 21st of each month." The latter accepted this proposition, and thereafter, from time to time, forwarded paper indorsed "For collection." Business was carried on under this arrangement for several months, when the Cincinnati bank failed, having in its hands, or in the hands of its sub-agent banks, the proceeds of paper thus forwarded. Held, that the relation between the banks was that of principal and agent until the collection of the paper and the receipt of the money by the Cincinnati bank, after which time the relation was that of debtor and creditor; and hence that the receiver of the Cincinnati bank could not be charged, as trustee, with any moneys which were collected, and passed into its general funds, before the failure, or which before that time were collected by sub-agents, and credited to it on a debt which it owed them, but that he could be so charged with moneys collected by a sub-agent before the failure, and afterwards paid to the receiver. 39 Fed. Rep. 684, affirmed. *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 S. E. Rep. 533; S. P., *Beal v. National Exch. Bank*, 5 C. C. A. 304, 55 Fed. Rep. 894, affirming S. C., 50 Fed. Rep. 355.

A city treasurer deposited checks in a bank, indorsed by him "For deposit," and the checks were immediately credited to him on his pass book, though not in pursuance of any agreement to that effect. He had been a depositor in the bank for some years, but had no agreement that his checks should be treated as cash, or that he should draw against them before collection. The bank became insolvent before the checks were collected, and their proceeds passed into the hands of a receiver. Held, that no title passed to the bank except as a bailee, and that the depositor was entitled to the proceeds. *Beal v. City of Somerville*, 1 C. C. A. 598. The decision of the court below was affirmed, but not upon this point. See 49 Fed. Rep. 790. To same effect: *Jones v. Kilberth*, 49 Ohio St. 401; 31 N. E. Rep. 346; *Wasson v. Hawkins*, 59 Fed. Rep. 233.

Plaintiff and defendant banks for several years had acted as agents for each other in the collection of checks, notes and drafts, the practice being for each to credit the other for checks when received, and for drafts and notes when advised of their payment. When a check was returned unpaid after being credited, the amount thereof was charged back again. The amounts thus collected were mingled with the general funds of the bank. Plaintiff sent defendant a note for "collection and credit," which, on maturity, was paid by a check, and credit was immediately given on the books. But defendant failed, and the check passed into the hands of the receiver. Held, that, in view of the course of dealing, the two banks stood in the relation of debtor

and creditor with respect to the amount of the check, and it became a part of the assets of the bank. *Franklin County Nat. Bank v. Beal*, 49 Fed. Rep. 606.

A bank holding a draft for "collection and returns," which accepts a check of the drawee, one of its depositors, and, without separating the amount from the general mass of its moneys, charges the same to the drawee, and credits the drawer on its books, holds the money as agent for the drawer, and not as trustee; and after the bank becomes insolvent the drawer is a mere general creditor, and not entitled to priority of payment out of the bank's assets. *Anheuser-Busch Brewing Ass. v. Clayton*, 6 C. C. A. 108; 56 Fed. Rep. 759.

A general depositor of a bank, who had a balance equal to the amount of his note held by the bank for collection, drew his check on the bank for the amount of his note, which was accepted by the cashier, and charged against his balance, and he received his note as paid. Shortly afterwards the bank failed for a large amount, due principally to its depositors, most of which was owing at the time of this transaction. No money was realized from the check, and no use was made of it to pay off the debts or increase the assets of the bank. Held, that the facts were not sufficient to create a trust in favor of the owners of the note. *Sherwood v. Milford State Bank*, 94 Mich. 78; 53 N. W. Rep. 923.

A bank which collects a letter of credit, left with it for that purpose only, holds the proceeds as a trust fund, though it credits the amount to the owner on its books, and notifies him of the collection, and he does not at once demand his money, and where the bank deposits the proceeds with another bank, and afterwards makes an assignment for the benefit of creditors, the owner of the letter of credit is entitled to be paid in full. *Nurse v. Satterlee*, 81 Iowa, 491; 46 N. W. Rep. 1102. To same effect, *Griffin v. Chase*, 36 Neb. 328; 54 N. W. Rep. 572; *Anheuser-Busch Brewing Ass. v. Morris*, 36 Neb. 31; 53 N. W. Rep. 1037.

10. Insolvency — when deposit may be treated as a trust fund.— Where the treasurer and tax collector of a county, without authority of law, deposits county moneys in a bank, and receives certificates of deposit marked "Special," the title to the moneys does not pass, although there is no agreement that the identical bills shall be returned, and they are mixed with the bank's general funds, and the county is entitled to recover an equal amount from a receiver of the bank prior to the payment of the general depositors. *San Diego County v. California Nat. Bank*, 52 Fed. Rep. 59. The county's rights in such case are enforceable only by a bill in equity, for there is no privity of contract between it and the bank. *Ibid.*

Where money and checks are unsuspectingly deposited in a bank, which is known by its managing officer to be hopelessly insolvent, a few minutes before closing hour on the last day on which it does business, and the checks are subsequently collected by the bank's clerk, the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who retains the specific money among the general mass of the bank's funds. *Wasson v. Hawkins*, 59 Fed. Rep. 233. A treasurer, being authorized by the supervisors, deposited county money in a private bank, which soon afterwards made an assignment. Plaintiffs, who were sureties on the bond given by the bank, paid the amount deposited, and brought an action against the assignee

to recover the money on the ground that it was a trust fund. Held, that the money lost its trust character when deposited. *Cadwell v. King*, 84 Iowa, 228; 50 N. W. Rep. 975.

11. Insolvency — set-off.— Debts of a partner and his firm to a bank cannot in equity be set off by a receiver of the bank against trust moneys, which the partner, after the debts were contracted, mingled with the firm deposits, without the bank's knowledge, and the whole amount of which remained continuously in the bank until it failed. *Knight v. Fisher*, 58 Fed. Rep. 991.

12. Forged and raised paper — Liability of bank upon its draft, raised by its clerk and by him sold to the plaintiff.— A bank clerk, whose duty it was to prepare exchange for the cashier's signature, so drew a draft for twenty-five dollars to his own order that the amount could be readily altered, and, after procuring the cashier's signature by pretending that he wished to make a remittance of that amount, altered the draft so that it presented the appearance of a genuine draft for \$2,500, and thereafter indorsed it, and procured it to be discounted. Held, that the forgery by the clerk, and not the negligence of the bank, was the proximate cause of the loss, and the bank was not liable therefor. *Exchange Nat. Bank v. Bank of Little Rock*, 7 C. C. A. 111; 58 Fed. Rep. 141. The bank was not liable on the ground that the forger was its confidential employee, because in this transaction he acted as a purchaser, and not as an employee, and because the purchase of the draft was complete, and he was the owner of it, when the forgery was committed. *Ibid.* Upon the first point the court says, in its opinion: "Nor is there, in our opinion, any sound reason why the liability of the maker of a promissory note or bill of exchange, complete in itself when issued, but subsequently fraudulently raised without his knowledge or authority, should be measured by the facility with which a third person has committed the crime of forgery upon it, or why he should be held liable for the loss resulting from such forgery. The altered contract is not his contract. His representation was not that the forged contract was his, but that the original contract was his, and the rule of caveat emptor makes it the duty of the purchaser when he buys it, and not of the maker, to then see that it is genuine. To cite and attempt to distinguish the decisions upon this question would be a work of supererogation. The authorities have all been carefully reviewed, and the conclusion to which we have arrived has been reached in *Holmes v. Trumper*, 22 Mich. 427, by Mr. Justice Christiancy, with whom Chief Justice Campbell and Justices Graves and Cooley concurred; in *Bank v. Stowell*, 123 Mass. 196, by Chief Justice Gray, without dissent from any member of the Supreme Judicial Court of Massachusetts; in *Burrows v. Klunk*, 70 Md. 451; 17 Atl. Rep. 378; in *Bank v. Clark*, 51 Iowa, 264; 1 N. W. Rep. 491; in *Fordyce v. Kisminski*, 49 Ark. 40; 3 S. W. Rep. 892; and in *Goodman v. Eastman*, 4 N. H. 455; while the decisions in *Simmons v. Atkinson*, 69 Miss. 862; 12 South. Rep. 263; *Charlton v. Reed*, 61 Iowa, 166; 16 N. W. Rep. 64; and *Angle v. Insurance Co.*, 92 U. S. 330, 340, are to the same effect. This question has been much discussed, and the authorities differ, but we think the better reasons, the most forcible and convincing opinions, and the marked trend of the later decisions support the view of the court below."

13. Right of bank to recover money paid by it on a raised draft of its own correspondent.— A draft for twelve dollars and fifty cents, drawn on plaintiff by a correspondent, was raised to \$5,000, and, as so raised, cashed by plaintiff upon defendant's presenting it indorsed for collection. Held, that, upon discovery of the fraud, plaintiff could recover from defendant the amount paid to it less twelve dollars and fifty cents, unless the signature of the drawer was also a forgery; and that the fact that the genuine signature of the drawer had been touched up a little with a brush or quill, but not essentially altered, did not constitute it a forgery. *United States Nat. Bank v. National Park Bank*, 129 N. Y. 647; 29 N. E. Rep. 1028.

14. License tax — validity.— Whether banks are proper subjects for the imposition of a license under police regulations is a matter for legislative determination. *City of Oil City v. Oil City Trust Co.*, 151 Penn. St. 454 25 Atl. Rep. 124. The good faith and reasonableness of a charge against banks, imposed by a city ordinance under a law authorizing the licensing of banks, being conceded, it will be presumed to be a license as it purports to be, and not a tax for revenue. *Ibid.*

15. Officers.— Where an officer of a bank, by agreement, conceals the defalcation of another officer, his knowledge of the transaction is not chargeable to the bank, so as to set running the Statute of Limitations, as against a claim against the defaulting officer for the amount of the loss. *Vance v. Mottley*, 92 Tenn. 452; 21 S. W. Rep. 593.

16. Effect of note payable to cashier.— A note payable to the cashier of a bank is to be deemed payable to the bank, and the bank may sue thereon as payee. *Erwin Lane Paper Co. v. Farmers' Nat. Bank*, 130 Ind. 367; 30 N. E. Rep. 411. See, also, *Nave v. Hadley*, 74 Ind. 155.

17. Suit for overdrafts — In an action by a bank for overdrafts paid on defendants' checks, where it appeared that plaintiff was instructed by defendants to cash no checks not countersigned by their bookkeeper, and that the checks for which recovery is sought were not so countersigned, the burden is on plaintiff to show that defendants received the benefit of the amount so drawn. *Gladstone Exchange Nat. Bank v. Keating*, 94 Mich. 429; 53 N. W. Rep. 1110. The fact that defendants had an opportunity of examining plaintiff's account against them does not estop them to rely on the violation of their instruction as a defense. *Grant, J., dissenting. Ibid.*

A bank sued to recover the amount of overdrafts made by defendant's agent, with which, unknown to his principal and its general agents, he had an account in his own name as "agent" only. The overdrafts were caused by drafts payable to the general agents, and remitted by him to them as money of defendant, to cover defalcations in his accounts with them. The agent had at all times sufficient money of defendant in hand to meet all the necessary expenses of the agency. Held, that it will not, in the absence of express authority to borrow money, be presumed that the overdrafts were for such purpose, and authorized by the principal. *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1; 30 Pac. Rep. 96.

LANCASTER V. AMSTERDAM IMPROVEMENT Co.

(Court of Appeals of New York, January 16, 1894.)

1. FOREIGN CORPORATIONS. CITIZENS OF ONE STATE ORGANIZING UNDER THE LAWS OF ANOTHER. VALIDITY. A corporation organized by citizens of New York under the laws of another state, and doing business in New York only, will be recognized as a valid corporation in New York.

2. CORPORATE EXISTENCE. RIGHT TO QUESTION. Where persons have attempted to incorporate under the laws of another state, filed a certificate as required by the laws of that state, and a certificate in New York, as required of foreign corporations, a person dealing with it cannot object to its title to land in New York on the ground of irregularity in its organization, it being a corporation de facto, and any question affecting its right to transact business because of the irregularity being a matter of inquiry for the state under whose laws it was incorporated.

3. POWER OF FOREIGN CORPORATION TO HOLD AND CONVEY REAL ESTATE. Nor can an individual dealing with such foreign corporation de facto object to its title to land on the ground that it has exceeded its authority to deal in land, the laws under which it is incorporated conferring some authority to acquire and convey land, and it being for the state under which it is incorporated to inquire into any excessive use of corporate powers.

4. Under General Corporation Law (Laws 1892, chap. 687), sections 15, 16, declaring that no foreign corporation shall do business in the state without a certificate from the secretary of state that its business is such as may be lawfully carried on by a domestic corporation, and that before granting such certificate the secretary shall require it to file a statement of the business it intends to carry on, a foreign corporation, incorporated for the purchase and sale of lands, having obtained such certificate, can transact such business in the state, such power not being limited by section 17 (re-enacted from Laws 1887, chap. 450, § 1), empowering a foreign corporation authorized to do business in the state to acquire such real property as may be necessary for its corporate purposes in the transaction of its business in the state.

5. PUBLIC POLICY. The public policy of a state is to be ascertained by reference to its Constitution, laws and judicial decisions.

THIS was a submission of a controversy to the General Term in the first department upon agreed facts. The Amsterdam Improvement Company was incorporated under the laws of the state of New Jersey in May, 1891, by five persons, of whom one only was a resident of that state, the others being residents of this state. Its certificate of incorporation, filed that day, contained the following article: "Second. That the places in this state where the business of such company is to be conducted are Jersey City and the city of Hoboken, in the county of Hudson.

The principal part of the business of said company within this state is to be transacted at Jersey City, in the county of Hudson, and the places out of this state where the same is to be conducted and where the company proposes to carry on operations are the cities of New York and Brooklyn, in the state of New York. And that the objects for which said company is formed are the purchase and sale of real property, both improved and unimproved; the improvement of such property as may be purchased and which, when purchased, is unimproved; the exchange of property for other property.; the lending of moneys upon first and second mortgages, secured by bonds, and the purchase and sale, by assignment or otherwise, of such mortgages and bonds. The portion of the business of said company which is to be carried on out of this state in the said cities of New York and Brooklyn will be such as will come under the head of the objects for which this company is formed. The principal office or place of business of said company, out of this state, is the city of New York, in the county and state of New York." On December 21, 1892, the secretary of state of the state of New York issued a certificate, of which the following is a copy: "State of New York. Office of the secretary of state, Albany. It is hereby certified that the Amsterdam Improvement Company, which appears from the papers filed in this office on the twenty-first day of December, 1892, to be a foreign stock corporation organized and existing under the laws of the state of New Jersey, has complied with all the requirements of law to authorize it to do business in this state, and that the business of such corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business." The statute under which this company was incorporated provided that "it shall be lawful for three or more persons to associate themselves into a company to carry on any kind of manufacturing, mining, chemical, trading or agricultural business, agricultural fairs and exhibitions for the encouragement of competition in agriculture, horticulture, breed of stock and development of speed in horses, the transportation of goods, merchandise or passengers upon land or water, inland navigation, the building of houses, vesseis, wharves or docks, or other mechanical business, the reclamation and improvement of submerged

lands, the improvement and sale of lands," etc. This statute also provided that corporations shall have the power "to hold, purchase and convey such real and personal property as the purposes of the corporation shall require, not exceeding the amount limited in its charter, and all other real estate which shall have been bona fide mortgaged to the said company by way of security, or conveyed to them in satisfaction of debts previously contracted in the course of dealings, or purchased at sales upon judgment or decree which shall be obtained for such debts." Other provisions authorized a company organized under the statute to carry on a part of its business, and to have offices out of the state, and that "they may hold, purchase and convey real and personal property out of the state, the same as if such real and personal property were situated in the state of New Jersey, provided that the certificate of organization shall state," etc. Another provision authorized any New Jersey corporation, incorporated under any general or special act, to conduct its business outside the state. May 23, 1891, Arthur P. Smith was the owner of a lot of vacant and unimproved land in the city of New York, which, by a deed dated that day, and duly recorded May 25, 1891, he conveyed to the defendant. On the 15th day of January, 1893, the plaintiff and the defendant entered into a written contract, whereby they agreed to exchange said lot of land for another lot of land owned by the plaintiff. The land of the plaintiff was valued at \$72,000, and the land of the defendant at \$49,500, and the difference, \$18,500, the defendant agreed to pay to the plaintiff at the times and in the manner specified in the contract. It was agreed that the deeds should be exchanged at a place named on or before February 15, 1893. Pursuant to said contract the defendant executed a deed in due form, by which it assumed to convey the premises to the plaintiff. It is conceded that the defendant has done no business in the state of New Jersey, and that the only business or transactions in which it has been engaged since its organization have been carried on in the city and county of New York.

The following question was submitted to the General Term: "Whether said defendant, the Amsterdam Improvement Company, possessed and has conveyed to Frederick J. Lancaster, the plaintiff herein, a good and sufficient title to the premises

described in said contract and deed." That court has adjudged that the defendant's deed did not convey to the plaintiff a good title, and that its title was subject to the right, title and interest of the people of the state, whose title was, at the time of the execution and delivery of the deed, superior and prior to that of the defendant.

Thomas S. Bassford, for plaintiff. *Louis Marshall*, for defendant.

GRAY, J. (*after stating the facts*). Before approaching the discussion of the principal question in this case, certain questions of subordinate importance may be disposed of, which have been raised upon the argument. One of them relates to the right of this corporation to recognition in our courts, as affected by the fact that the incorporators are, with one exception, citizens and residents of this state. Whatever inference can be drawn as to the motives which took them into a foreign jurisdiction to organize a corporation under its laws, I agree with the General Term that any such question has been once and for all settled by our recent decision in the case of *Demarest v. Flack*, 128 N. Y. 205; 28 N. E. Rep. 645. It appeared in that case that citizens of this state incorporated under the laws of West Virginia to carry on a certain business, with the principal office of the company in New York city, and where only it had been conducting its operations. It was claimed that these facts invalidated the corporation, and that there was a manifest evasion of, and fraud upon, the laws of the state. But it was held that they constituted no reason for refusing recognition to the corporation; that there was no essential difference between a corporation formed under the laws of a foreign state, the members of which were its own citizens, and one so formed, the members of which were citizens of our own state. If our citizens are attracted to other jurisdictions for purposes of incorporation, because of more favorable corporation or taxation laws, I cannot see in that fact, however and in whatever sense to be deplored, any reason that they should be prevented from employing here the corporate capital in the various channels of trade or manufacture. That, as it seems to me, would be a rather hurtful policy, and one not to be attributed to the state.

Another question relates to the regularity of the proceedings for the incorporation of the defendant company under the laws of the state of New Jersey. I am unable to perceive any defect therein. I should say there had been a compliance with its statutes. But, if there could be pointed out some irregularity, it could not be made the subject of an objection to the defendant's title. It was a corporation de facto. Its incorporators had filed their certificate of incorporation as required by the laws of New Jersey, and a certificate had been filed in the office of the secretary of state of this state, as required by our laws of a foreign corporation. It was exercising a franchise attempted to be conferred upon it by the laws of New Jersey, and any question affecting its right to transact business because of alleged irregularities in organization is a matter for the government of that state to inquire into. It was said in *Methodist, etc., Church v. Pickett*, 19 N. Y. 482, with respect to the capacity of corporations to act, that "the rule established by law, as well as by reason, is that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization, or any subsequent abuse of their powers, not connected with such dealing. As long as they are overlooked or tolerated by the state, it is not for individuals to call them in question." That this principle is equally applicable to foreign corporations de facto was held in *Bank of Toledo v. International Bank*, 21 N. Y. 542. With respect to the question of whether the laws of the state of New Jersey authorize the kind of business which this company was organized and proposes to transact, I think that the provisions of the statute for the formation of corporations, to which our attention is directed, are broad enough in their scope to comprehend the objects of this incorporation. They authorize incorporations for the purpose of the improvement and sale of lands. With such an authorization, and, as a corporation, being vested under those laws with the authority to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, there is ample support for a construction that this company may deal in the purchase and sale of real estate. But, if any doubt might be entertained upon the correctness of our construction of this foreign statute, I do not think the doubt affects the question here. If to engage

in the business of buying and of selling real property is to act in excess of the powers conferred upon the corporation by the statute of New Jersey, it is for that government to inquire into the exercise by its creature of corporate powers. It is not a question which the party dealing with it can raise. As a corporation *de facto*, possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred; and unless in the laws of this state we are able to find a prohibition, expressed therein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed.

The principal question for our consideration is one of great importance, for upon its decision not only depend large interests, but a judicial definition of state policy. That question may be thus succinctly stated: Under our laws can a foreign corporation, incorporated for the purpose of dealing in the purchase and sale of real property, come into this state and transact here such kind of corporate business? The General Term put the question in somewhat different form: Whether it may "purchase and hold lands within this state which are not necessary for its business, and which have not been acquired in securing the payment of a debt due to it." That is hardly exact as applied to the case of this corporation. As I have shaped it, the question is certainly made broad enough. The opinion of the General Term was delivered by Mr. Justice Follett, whose opinions are entitled to the highest respect, and he negatives the proposition embodied in the question upon the ground, in substance, that from certain general statutes of this state, which relate to the right of foreign corporations to purchase or acquire and to convey real property, and from numerous special acts passed to authorize them to acquire lands, it is to be inferred that "it is contrary to the policy of this state to permit such corporations to take, hold and convey lands in this state without being specially authorized so to do." The general statutes to which he refers are chapter 158 of the Laws of 1877 and chapter 450 of the Laws of 1887, and he considers that to their declarations is to be referred solely the question of the right of foreign corporations generally to acquire, hold and convey lands, for they alone recognize their right in such

respects. The act of 1877 authorized a foreign corporation to purchase at a sale under the foreclosure of a mortgage or under a judgment held by it; to hold the land purchased for not exceeding five years, and to convey it, etc. The act of 1887 authorized a foreign corporation doing business in this state to acquire such real property as might be necessary for its corporate purposes in the transaction of its business here. Both provisions were re-enacted in the General Corporation Law of 1892 (Chap. 687, Laws 1892) as sections 17 and 18. In order to uphold the validity of the conveyance in question here, I think we might very safely rest our conclusions upon the enactment of 1887 if other grounds were lacking. We might, without doing violence to any rule of law, say that that act was such sufficient authority as to make the title to the land conveyed by the foreign corporation quite indefeasible in its grantee. The General Term thought it was not broad enough; but there would not be much stress in reasoning that, the foreign corporation being authorized to do business here, the authorization of the act of 1887 "to acquire such real property as may be necessary for its corporate purposes in the transaction of its business in this state," even though we were disposed to define it as comprehending merely property for proposed use as an office, a warehouse or factory, etc., would, nevertheless, be sufficient to enable the corporation in possession of land by its conveyance to vest in the grantee a good title to it. It is not for the party contracting for the conveyance of its land to raise the question of how far his grantor may have exceeded the authority given by the statutes of the state, any more than he might with respect to an alleged abuse of the powers conferred by its home charter. Those are questions between the corporation and the government. The presumption militates in favor of the validity of the transaction, and the right of interference by the state does not extend to any forfeiture of the property held by the corporation. In *re McGraw*, 111 N. Y. 66, 96; 19 N. E. Rep. 233.

In *Cowell v. Springs Co.*, 100 U. S. 55, the objection was that the National Land Improvement Company, a Pennsylvania corporation, which granted certain lands in Colorado to the springs company, was not empowered to acquire a right to the lands, for

the reason that they were not necessary to enable it to carry on its business, to which extent corporations in Colorado were limited, because of restrictions upon the legislative power in the creation of corporations. It was held that "whether the particular premises in controversy are necessary for that business is not important. That is a matter between the government of the state and the corporation, and is no concern of the defendant." But we are not confined to any such narrow ground as a construction of the particular acts referred to. Our general laws are such as to evidence a state policy which makes no invidious distinction against foreign corporations coming within our boundaries to extend the area of their lawful operations. The answer to the question is not to be found in the acts to which the learned General Term justices refer. If they have not overlooked, they have failed, in my judgment, to give due weight and significance to other provisions upon our statute books. The General Corporation Law, passed in 1892, contains these further provisions as to foreign corporations: "Sec. 15. No foreign stock corporation other than a monied corporation shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar purposes. * * * The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December 31, 1892, without having procured such certificate from the secretary of state. * * * No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate. Sec. 16. Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within

the state, and a place within the state which is to be its principal place of business, and designating, in the manner prescribed in the Code of Civil Procedure, a person upon whom process against the corporation may be served within the state. The person so designated must have an office," etc.

The negative form of the legislative expression is pregnant with meaning. All foreign stock corporations are accorded the same right to transact their business here as domestic corporations have, if it be one which the latter may also lawfully transact, and provided there has been compliance with certain stated requirements. It is a recognition of the right of a foreign corporation to do business here, with the imposition of reasonable conditions. A certificate was granted by the secretary of state, in December, 1892, which certified a compliance with all the requirements of law, and that the business of the corporation to be carried on here was such as may be lawfully carried on by a corporation incorporated under our laws for such or similar business. By chapter 691 of the Laws of 1892, known as the "Business Corporations Law," what restrictions may have existed upon the organization of corporations in this state previously were done away with. Under that law "three or more persons may become a corporation for the purpose of carrying on any lawful business," by executing and filing a certificate, which shall contain the objects for which formed, including the nature and locality of the business. The effect of all recent legislation is, most clearly, to remove all barriers to the transaction, through incorporation, of any lawful business in this state, and to recognize an equal right in the foreign corporation with that of the domestic corporation. Presumably, in the opinion of the learned General Term justices, it was not considered that sections 15 and 16 of the General Corporation Law include within their purview such a business as the acquisition of lands within this state by foreign corporations for purposes not connected with necessities for a corporate use. But I do not think we can so limit the meaning of these sections. It is true that they are followed by sections 17 and 18, to which the opinion below attaches such weight; but their presence is no warrant for ignoring the broad and general authority contained in the preceding provisions. Section 18 may still have an office to perform, in limiting the period of time for which a foreign corporation, without a

certificate here, may hold land taken for a debt, or purchased at a sale under a judgment or decree; while the necessity for retaining section 17 is not readily perceived. The foreign corporation, which desires to acquire real property solely for use connected with the transaction of its business here, must, under section 15 procure the certificate of the secretary of state as a condition of being permitted to carry on business; and, having the certificate, its right to do business as freely as a domestic corporation necessarily carries with it the recognition of the right to acquire and hold what real property may be necessary for that purpose. Both sections, possibly, were retained in the revision of corporation laws out of abundant caution. Neither section is a new enactment, but merely the continuation of an existing law. Whatever the reason to be assigned for retaining sections 17 and 18, the provisions of sections 15 and 16 contain an authoritative declaration by the legislature, and we neither can nor should attempt to refine away their comprehensive meaning. Nor am I able to perceive that it is, or that it ever was, the policy of this state to prevent foreign corporations from acquiring and holding real property here, if desired for the transaction of any lawful business. To discover the public policy of a state we are limited, as it was observed by Mr. Justice Story, in the *Girard Will Case*, 2 How. 127, to what "its Constitution and laws and judicial decisions make known to us." I am aware of nothing in the Constitution upon the subject. There were no statutes passed upon the subject prior to the act of 1877, referred to; and in their silence the principle of a general right in legally constituted corporations, with sufficient chartered powers, and the principle of assent implied by the general law of comity between states, had a scope for operation in favor of the right of a foreign corporation to acquire and hold real property here. If special enabling acts have been procured in particular cases, they do not, necessarily, disprove the general right. Prudence and cautious counsels may have dictated their procurement. While the enactment of the statute of 1877 contained a limitation upon the right of the foreign corporation to hold real property with respect to time, the subsequent act of 1887, was in the direction of removing such or any limitation. Then came the general statutes of 1892, which allowed all foreign corporations to do business here, upon com-

pliance with conditions named, and which placed them upon a similar footing with domestic corporations as to transaction of a corporate business.

If we turn only to the decisions of this court in our investigation of what has been the public policy of this state towards foreign corporations, we find them interpreting and applying the principle of state comity in the broadest spirit. In *People v. Fire Ass'n of Philadelphia*, 92 N. Y. 311, it was observed that, "where a state does not forbid, or its public policy, as evidenced by its laws, is not infringed, a foreign corporation may transact business within its boundaries, and be entitled to the protection of its laws." In *Hollis v. Drew Seminary*, 95 N. Y. 166, it was held that, "unless the legislature forbids, they (foreign corporations) can come here as freely as natural persons, and exercise here all the powers conferred upon them by their charter, subject to the limitation imposed upon natural persons; that is, they can do no acts in violation of our laws or of our public policy. But unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations can do." This decision was in line with the early case in this court of *Bard v. Poole*, 12 N. Y. 495, in which the discussion turned upon the question of the right of a corporation of the state of Maryland to make loans secured by mortgages upon real estate within this state. Judge Denio said, in the opinion in that case, that "any of the states of the Union may, as this and several of the other states have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business within its jurisdiction. But, in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law, and not inconsistent with the policy of the state as indicated by the general scope of its laws or Constitution, corporations are permitted by the comity of nations to make contracts and transact business in other states than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other states. It is, of course implied that the contract must be one which the foreign corporation is permitted by its charter to make, and it must also be one which would be valid if made at the same place by a natural person, not a resident of that state." It seems

to me to be very clear, upon examination of our laws, and by reference to such judicial opinions, that there never was a time in the history of the state when a foreign corporation was prevented from entering its boundaries to transact any lawful business which a non-resident natural person might have transacted here. What public policy is invaded, and what public interests are prejudiced, by extending to the foreign corporation, for the transaction of its business, the privileges and protection of the laws of our own state, even when that business involves the acquisition of and dealing in real property? If we were to consider the question simply in the light of a sound or a good policy, there are abundant reasons for holding that it is to the public advantage that our borders should be as much open for all lawful purposes to foreign corporations as to natural persons. Their advent and lawful operation cannot but tend to some advancement of our commercial interests, and must advantage the commonwealth. It is the policy of the state to encourage the employment of capital here by liberal laws. Upon what reasonable ground shall we recognize the natural person who comes here and refuse recognition to the foreign corporation? And how is the matter affected if the capital is employed in dealing in the acquisition and barter of lands, and not in commerce, manufacturing or such like ways? What legal difference is there, which the state can recognize, if all the corporations happen to be residents of this state? The corporation is, nevertheless, a legal entity, endowed by a sister state with capacities and powers, and seeks our state as the field of its activity in the conduct of its business enterprise. Incorporations are, as a rule, advantageous to private and to public interests. As the business capacities of the general mass of mankind are constantly improving, associations of individuals, voluntarily combining their contributions, are able to perform works of various characters which no one person is able to accomplish. I believe that to be a well-recognized principle in political economy. But we are not to consider the question as one simply of sound or of good policy, but whether there is any known public policy which is affected. What reason is there that the courts shall condemn the business proposed to be carried on by the defendant? What vice inheres in it? The case does not fall within those which the courts have

decided to be against public policy. The business is not immoral in itself. That it is not prohibited by legislation I think I have been able to show.

In the opinion below it is suggested that if the defendant may legally acquire and convey land in this state at pleasure, there is no limitation upon the amount which a foreign corporation may hold, except in its ability to purchase and pay. As applied to the case of this corporation, it might be a sufficient answer to say that the chartered purpose of dealing in the purchase and sale of real property rather negatives the idea of an intended accumulation of real estate holdings to any extraordinary extent. But a better answer would be that it is always within the power of the legislature to interfere, and to regulate, if, by the magnitude of the business, the public interests are affected, and seem unduly threatened. Decisions of this court might be referred to, to show how far the legislative power has been deemed to extend in the direction of controlling a private business on the ground that its magnitude affected the public and justified such interference. Without prolonging the discussion, I think the General Term erred in their conclusions, and that the judgment should be reversed, and that judgment should be ordered for the defendant upon the submission, with costs. All concur, except Bartlett, J., not sitting. Judgment accordingly.*

FOREIGN CORPORATIONS — RECENT DECISIONS.

1. The law of foreign corporations generally.—Prior decisions and notes in these reports relating to foreign corporations will be found referred to in note to *Wright v. Lee*, 8 Am. R. R. & Corp. Rep. 238, 281.

2. Pleading and proof of corporate existence.—Where, in an equitable action, the bill alleges that plaintiff is a foreign corporation, a general denial puts in issue the corporate character of plaintiff, and proof thereof is necessary to entitle it to recover. *Bank of Jamaica v. Jefferson*, 92 Tenn. 537; 22 S. W. Rep. 211. The general statutes of Washington (§§ 1498, 1499) provide that a copy of any certificate of incorporation of a domestic corporation, certified by the secretary of state, shall be received in the courts as prima facie evidence of the formation of the company; and section 1524 confers on foreign corporations the same rights to transact business and to sue and be sued in this state as are given domestic corporations. Section 1525 provides that a foreign corporation shall cause to be filed and recorded in the office of the secretary of state a certified copy of its articles of incorporation, certified to by the officer who is the custodian of the same, according to the laws of the

* Reported in 140 N. Y. 576; 35 N. E. Rep. 964.

state where it is incorporated, and attested by such officer under his hand and seal of office, which attestation shall be prima facie proof of the facts therein stated; and section 1526 provides for the appointment of an agent of such corporation, to be filed and recorded with the secretary of state. Held, in an action by a corporation of a sister state, that the documents thus required to be filed are to be considered as the original instruments, and copies thereof certified by the secretary of state, introduced in evidence, were prima facie proof of the facts therein recited. *Knapp, Burrell & Co. v. Strand*, 4 Wash. 686; 30 Pac. Rep. 1063. See, also, *United States Vinegar Co. v. Foehrenbach*, 26 N. Y. S. 632.

3. Taxation.—A foreign corporation which does some of its manufacturing in New York, though the greater portion is done in another state, is within the exception of Laws 1880, chapter 542, section 3, as amended by Laws 1885, chapter 359, providing that any foreign corporation doing business in New York shall be taxable there, except manufacturing corporations "carrying on manufacture * * * within this state." *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323; 31 N. E. Rep. 238. Under Laws 1880, chapter 542, which provides that the basis of the taxation of foreign corporations not within any of the exceptions "shall be the amount of capital stock employed in this state," the value of all goods on hand, and property and money on deposit and used in business, in New York, may be considered in estimating the amount, but not sales made by sample at its business offices in New York, to persons without the state, with delivery from its factory in another state. *Ibid.* Where the only property that a foreign corporation has within the state is a small amount of furniture in an office, and the only obligations it incurs in the state are for rent of such office, and the salary of its agent in charge of the same, it employs no capital in the state that can be made the basis of taxation. *People ex rel. Harlan & H. Co. v. Campbell*, 139 N. Y. 68; 34 N. E. Rep. 753.

A foreign railroad corporation, by acts of the legislature of Pennsylvania, was permitted to build a portion of its road through the state. By a certificate filed with the secretary of state under provisions of act Pennsylvania, April 22, 1874, the company designated a place of business, and an agent to represent them in the state. Act Pennsylvania, June 30, 1885, section 4, provides for the taxation of the indebtedness of all corporations "doing business in this commonwealth," and the collection of the tax by the corporation. Held, that such act applied to the railroad company, and was a proper exercise of legislative power. *Commonwealth v. N. Y., L. E. & W. R. Co.*, 145 Penn. St. 57; 22 Atl. Rep. 212. The New York, Lake Erie and Western Railroad Company, a foreign corporation, was permitted by acts Pennsylvania, February 16, 1841 (P. L. 28), and March 26, 1846 (P. L. 179), to build a portion of its road in the state on payment of \$10,000 annually to the state after its completion. Held, that act June 30, 1885, which imposes a tax on "any scrip, bonds or certificates issued by a foreign corporation to residents of this state, and held by them," makes it the duty of the treasurer of such corporation to assess and retain the tax when payment of interest is made on such bonds, and to report the amount thereof "as nearly as the same can be ascertained;" failing which, the corporation is liable for the tax, applied to such company and did not

impair the obligation of the contract between the state and the corporation, as set forth in the above private statutes. *Ibid.* Where, under the same statute, the report of defendant's treasurer showed that it had issued bonds, etc., to the amount of \$78,000,000, whose ownership could not be determined except as to some \$28,000,000, which were registered for the purpose of voting, of which \$338,000 were owned by residents of Pennsylvania, it was held that it is not to be presumed, for purposes of taxation, that the unregistered bonds, etc., of defendant were held by residents of Pennsylvania in the same proportion, and defendant is only liable for the tax on those which are shown to be actually so held. *Commonwealth v. New York, L. E. & W. R. Co.*, 145 Penn. St. 57; 22 Atl. Rep. 236.

4. Taxation of shares of foreign corporations and associations.—A statute of Connecticut, which provides that personal property in the state, not exempt from taxation, shall include all stocks not issued by the United States, applies to foreign express companies in the nature of partnerships, created for a specific period of years, and whose stock is divided into shares, made transferable, also assessable for losses and liabilities of such companies, and which is treated by them, their shareholders, and the commercial world as shares of stock. *Lockwood v. Town of Weston*, 61 Conn. 211; 23 Atl. Rep. 9. The stock of such companies comes within General Statutes, section 3830, which provides that the tax list of any person need not include any property situated in another state when it can be made satisfactorily to appear to the assessor that the same has been fully assessed in such state; and, unless the contrary clearly appears, the presumption is that such stock has been assessed elsewhere. *Ibid.* The foregoing case concerned stock in the American Express Company and United States Express Company. In *Sanford v. Gregg*, 58 Fed. Rep. 620, it was held that the capital stock of the Adams Express Company, which is a similar association, was not taxable under Pennsylvania statutes, as being the stock of a company "incorporated by another state," and doing business in Pennsylvania.

5. Power to acquire or hold real estate.—While a statute of Nebraska which provided that no foreign corporation "shall acquire or own, hold or possess, by right, title or descent accruing hereafter, any real estate in the state of Nebraska," was in force, *C. Aultman & Co.*, a foreign corporation, purchased real estate in this state at a judicial sale. Held, that its title is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose. *Carlow v. C. Aultman & Co.*, 29 Neb. 672; 44 N. W. Rep. 873. For a construction of the statutes of Washington on the same subject, see *Realty Co. v. Appollonio*, 5 Wash. 437; 32 Pac. Rep. 219.

6. Service of process upon foreign corporations—who are agents within the meaning of statutes as to service.—In an action against a foreign corporation, the citation was served upon the corporation, in its own state, by delivery to the president of the corporation. The corporation answered by pleas to the jurisdiction, on the ground of non-residence and substituted service, and, reserving its right thereunder, filed a plea to the merits. Held, that its voluntary appearance by plea to the merits was a waiver of the

objection to the jurisdiction. *St. Louis, S. & T. R. Co. v. Whitley*, 77 Tex. 126; 13 S. W. Rep. 853.

The statute of Arkansas (Mansf. Dig. § 3834) provides that no foreign insurance company, nor its agents, shall do business in this state until it has filed with the state auditor a written stipulation, duly authenticated by the company, agreeing that any process affecting the company, served on the auditor, any one designated by him, or the agent specified by the company to receive service of process, shall have the same effect as if served personally on the company within the state. Held, that, where a foreign insurance company had appointed the auditor to receive service, service upon him would be sufficient to give the Circuit Court jurisdiction of the company, not only in cases arising out of the regular business of the company, but also in case of libel by the company published within the state. *American Casualty Ins. Co. v. Lea*, 56 Ark. 539; 20 S. W. Rep. 416.

A statute of Pennsylvania provides that in actions against foreign corporations, "process may be served upon any officer, agent or engineer of such corporation," in a manner specified. Held, that it did not apply to foreign corporations not doing business in the state, and that the courts of Pennsylvania can acquire no jurisdiction of a foreign corporation which has never done business in the state by service of process upon its president while he is temporarily in the state for either business or pleasure. *Phillips v. Burlington Library Co.*, 141 Penn. St. 462; 21 Atl. Rep. 640. A statute of Nebraska provides as follows: "Where the defendant is a foreign corporation, having a managing agent in this state, the service may be had upon such agent." Under this statute it was held that where the agent of a foreign corporation comes into the state and purchases a bill of goods, the corporation may be sued for the price of the goods, within the state, and that the agent who bought the goods was a "managing agent" within the statute, although it did not appear that the corporation had transacted any other business within the state, and that service upon such agent while he was temporarily within the state gave jurisdiction of the corporation. *Kloff v. Creston City Guarantee Water Works Co.*, 34 Neb. 808; 52 N. W. Rep. 819.

The appointment of the state superintendent of insurance as the attorney of a non-resident insurance company for the purpose of receiving service of process, as required by Laws New York, 1884, chapter 346, section 1, does not authorize him to accept service by mail, and such service is void. *Former v. National Life Ass.*, 50 Fed. Rep. 829. The removal of a cause by defendant, after specially appearing in the state court for the purpose of objecting to the sufficiency of service, does not constitute such a general appearance as will prevent the federal court from setting aside the service as illegal and void. *Ibid.*

Howard's Statutes Michigan, section 8086, as amended by Acts 1889, No. 266, provides that any corporation may be garnished under the act. If foreign, the writ may be served upon any officer or agent in the service of the corporation within the state, whether he is in the state upon the business of the corporation or not; and the disclosure of such officer or agent shall be considered the answer of the corporation. Held, that service may be made, in the case of a foreign mining corporation, upon a resident agent, whose duty

It is to act as custodian of the property of the company and inspect the mines, whether he has any other duties conferred upon him or not. *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464; 50 N. W. Rep. 389. The provisions of said section 8066 relative to service upon foreign corporations are not obnoxious to Constitution of United States, amendment 14, in denying to such corporations the equal protection of the law. *Ibid.*

In an action against a New York corporation publishing a newspaper there, service of summons in New Jersey, upon a person whose only connection with the company consists in receiving advertisements at the published rates, forwarding the same to the home office, receiving thence bills for the same and collecting them upon commission, is not a service upon an agent of the company, within the meaning of section 88 of the Corporation Act. *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150; 20 Atl. Rep. 760.

The Indiana statutes provide that process against a foreign corporation may be served on certain officers or agents, and, if none such can be found, then on any person authorized to transact business in the name of the corporation. Such statutes also forbid any foreign insurance company to do business in Indiana, unless it shall first file a written consent with the state auditor that process may be served on any authorized agent of the company in the state, and declare that any person who shall receive or transmit money for its use, or transact any business on its account, shall be deemed its agent. Held, that a person in Indiana who delivered policies of a foreign insurance company on application made in Indiana, and received assessments from members of such company, pursuant to notice from the company to pay the same to him, and who transmitted such assessments to the company with periodical statements, was its agent, and service of process on him in an action brought in Indiana gave the court jurisdiction of the corporation. *Reyer v. Odd Fellows' Fraternal Acc. Assn.*, 157 Mass. 367; 32 N. E. Rep. 469.

Defendants' general agents appointed a sub-agent, and directed him to sign all papers of importance, "C. A. & Co. [principals], by W. G. & W. B., General Agents, by S." (sub-agent). The sub-agent proceeded to sell machinery and settle accounts in the name of the principal, who recognized his settlements and received the benefit of his services. Held, that service of a summons on such agent was sufficient under Revised Statutes of Wisconsin, section 2637, subdivision 11, providing for service of summons against a foreign corporation, on any agent "having charge of or conducting any business therefor in this state." *Burgess v. C. Aultman & Co.*, 80 Wis. 292; 50 N. W. Rep. 175.

A non-resident corporation sold its goods only to certain persons in each state whom, in its circulars, it styled "distributing agents," under an agreement whereby each of the latter was to buy exclusively from it, and to sell at trade prices prescribed by it. On complying with these conditions for a given time the "agent" was to become entitled to a certain rebate, and also to have authority to issue to his wholesale customers certificates binding the corporation to pay a rebate directly to them, provided they continued for a given time to purchase from him exclusively. He sustained no other relation to the company, and the goods purchased by him were absolutely his own. Held, that he was not the agent of the corporation, within the meaning of

Code of Maryland, article 23, sections 295, 296, authorizing service against foreign corporations upon their agents or attorneys. *Gottschalk Co. v. Distilling & Cattle Feeding Co.*, 50 Fed. Rep. 681. Whether one is a resident agent of a foreign corporation is held to be a question of fact for the trial court in *Hester v. Rasin Fertilizer Co.*, 33 S. C. 609; 12 S. E. Rep. 563.

Where the regulations of an association having a benefit department require the secretary of each local division to certify to the health of every applicant for insurance, to keep a correct list of the members of the benefit department, to place thereon the name of any member of the insurance department joining his division by transfer from any other division, and also make it the duty of members to notify him of any changes of residence, such secretary must be considered an insurance "agent" of the association, under Revised Statutes of Wisconsin, section 2637, subdivision 9, and section 1977, declaring who shall be considered agents of a foreign insurance company for the purpose of receiving service of process. *Dixon v. Order of Railway Conductors of America*, 49 Fed. Rep. 910.

7. Garnishment.—A debt due from a corporation for services rendered in the state where the debtor was incorporated and the creditor domiciled cannot be reached by garnishment in another state, as it cannot be brought under the legal control of the court, even if it should have statutory provisions for serving process on foreign corporations in such cases. *Havana G. S. R. Co. v. Chumley*, 92 Ala. 317; 9 South. Rep. 286.

Service of a writ of garnishment on an officer of a foreign benevolent corporation, when found in the state, is sufficient, and his disclosure admitting liability is binding on the corporation, under Public Laws Michigan, 1889, act 266, which provides that a garnishment may be served on the officer of a foreign corporation found within the state, whether he is on business of the corporation or not, and the officer shall make disclosure which shall be considered the answer of the corporation. *First Nat. Bank v. Burch*, 80 Mich. 242; 45 N.W. Rep. 93. Under Public Acts Michigan, 1889, No. 266, providing that any corporation, foreign or domestic, other than municipal, may be garnished, a foreign mutual benefit corporation, owing moneys on a certificate of membership issued to a resident of Michigan for the benefit of persons dependent on him for support, may be garnished in that state by a creditor of the holder of such certificate, though, by the law of the state in which the corporation is organized, such moneys are exempt. *Ibid.*

Before the passage of the law of 1891, a corporation doing business both in Missouri and in Illinois could be garnished in the latter state upon an indebtedness contracted and payable in Missouri, even though plaintiff and the principal debtor were both residents of Missouri, and though the garnishment proceedings were brought in Illinois for the express purpose of evading the exemption laws of Missouri. *Railroad Co. v. Barron*, 83 Ill. 365, followed. 41 Ill. App. 543, affirmed. *Wabash R. Co. v. Dongan*, 142 Ill. 248, 31 N. E. Rep. 594.

In the absence of any statutory provision, certificates of stock in a foreign corporation are not subject, as choses in action, to garnishment process under a writ of attachment. *Armour Bros. Banking Co. v. Smith*, 113 Mo. 12; 20 S. W. Rep. 690.

For the construction and application of various statutes in relation to garnishment proceedings see the following: *Carson v. Memphis & C. R. Co.*, 88 Tenn. 646; 13 S. W. Rep. 588; *Dittenhoffer v. Coeur D'Alene Clothing Co.*, 4 Wash. 519; 30 Pac. Rep. 660; *Central R. & B. Co. v. Georgia Construction, etc., Co.*, 32 S. C. 319; 11 S. E. Rep. 192; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524; 30 Pac. Rep. 765; *Rainey v. Maas*, 51 Fed. Rep. 580.

8. Jurisdiction as respects relief which may be granted against foreign corporations.—The courts of Massachusetts will not take jurisdiction of a suit by the stockholders of a Missouri corporation to enjoin the corporation from issuing bonds secured by mortgage on property in Missouri. *Kimball v. St. Louis & S. F. R. Co.*, 157 Mass. 7; 31 N. E. Rep. 697. The federal Circuit Court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations; nor has it any such power under the act of parliament known as the English "Companies Act, 1862." *Republican Mountain Silver Mines v. Brown*, 7 C. C. A. 412; 58 Fed. Rep. 644. A Circuit Court, as a court of equity, should not interfere, at the suit of shareholders in the United States of an English mining company operating a mine in the United States, to restrain proceedings by English shareholders to wind up the company, merely on account of the motives which may have inspired their conduct, so long as their action was strictly in accordance with English laws, and not in violation of the company's charter or by-laws. 55 Fed. Rep. 7, reversed. *Ibid.*

9. Validity of contracts made before complying with statutes as to doing business in state.—General Statutes of Washington (§§ 1524–1581) provide that foreign corporations are authorized to do business in this state by compliance with the conditions prescribed relating to the filing of a certified copy of the charter and the appointment of an agent, and that any agent of any foreign corporation conducting or carrying on business within the limits of this state, for and in the name of such corporation, contrary to any of the provisions of the statutes, shall be deemed guilty of a misdemeanor, etc. Held, that a contract made in this state with such corporation, which had not complied with the statute, was not void, in the absence of a statute so declaring. *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67 · 31 Pac. Rep. 327.

BUHL v. FORT ST. UNION DEPOT CO.

(Supreme Court of Michigan, February 6, 1894.)

1. EMINENT DOMAIN. VACATING STREET. RIGHT OF ABUTTING OWNER TO DAMAGES. Under a statute providing that any railway company may, with the permission of the common council of any city, close any street within the limits of its depot grounds, but that the company shall pay to the parties entitled to the same any and all damages that may accrue to them in consequence thereof, the owner of property on the corner of two streets, one of

which is so closed for several blocks directly beyond his property, thereby rendering it less accessible from that direction, cannot recover damages therefor, as what damages he may suffer are *damnum absque injuria*.

2. A distinction may well be held to exist between the injury which results to an abutting owner, or another so situated that the means of ingress and egress to and from his premises are cut off by a discontinuance of a street, and one owning land upon another street, or on the same street at a distance from the part of the highway discontinued.

ACTION by Christian H. Buhl against the Fort Street Union Depot Company. There was a judgment for defendant and plaintiff brings error.

C. A. Kent, for appellant. *James F. Joy* and *F. A. Baker*, for appellee.

MONTGOMERY, J. The common council of the city of Detroit vacated that portion of Fourth street in said city extending from Congress street to Fort street. The defendant thereupon occupied the vacated portion of the street for depot purposes, which of course resulted in closing the street to public travel. The action was had under authority of act No. 94 of the Laws of 1891, amendatory to the "Union Depot Act," so called. The amendatory section of 1891 provides that "any corporation organized under this act shall have power, with the consent of the common council of any city, or the village board of any village, in which the station and depot grounds of such company are located, to occupy and close any highway, street or alley within the limits of its station and depot grounds, but such company shall pay to the parties entitled to the same, any and all damages that may accrue to them in consequence of the closing of any such highway, street or alley; and such damages may be recovered in an action on the case in any court of competent jurisdiction." The plaintiff is the owner of a brick block fronting Fourth street and extending from Larned street to Congress. He brings this suit to recover damages resulting to his property from the closing up of Fourth street between Congress and Fort. The portion of the street beyond Congress is made less accessible from plaintiff's property, it being made necessary to make a detour to Third street instead of passing directly through what was formerly a part of Fourth. It cannot be doubted that there has been some

resulting disadvantage occasioned by the closing of that portion of the street. The question presented is, is the resulting inconvenience *damnum absque injuria*, or should the damages actually resulting to the property be held recoverable? It is contended, on the one hand, that such inconvenience as the plaintiff suffers is of like character to that which any member of the community submits to, differing only in degree. On the other hand, it is broadly claimed that under the statute in question any person who is actually damaged by the closing of the street is entitled to recover his damages, and the fact that it is difficult to draw the line showing when depreciation of property will end does not militate against the right, or present any greater obstacle than is often presented in other classes of cases, and that the question can safely be left to the good sense of the court and the jury.

1. Under the right of eminent domain, where there is no other limitation of the power than such as is contained in our Constitution, which provides that private property shall not be taken for public use without just compensation, it is conceded that it is competent for the legislature to provide for a public improvement which may work an incidental damage to property without providing compensation for property not actually taken. See *Pontiac v. Carter*, 32 Mich. 164; *Hinchman v. Detroit*, 9 Mich. 103; *People v. Ingham Suprs.*, 20 Mich. 95. And the distinct question of whether the discontinuance of a public street, or its appropriation to other purposes than that of a highway, constitutes a taking of the property of the users generally (other than abutting owners) has been distinctly ruled in the negative by many of the American courts. See *McGee's Appeal*, 114 Penn. St. 477; 8 Atl. Rep. 237; *Smith v. Boston*, 7 Cush. 254; *Paul v. Carver*, 24 Penn. St. 207; *Fearing v. Irwin*, 55 N. Y. 486; *Hatch v. Railroad Co.*, 25 Vt. 49; *Dill. Mun. Corp.* (4th ed.) § 666. But it is contended that the statute in question is more nearly analogous to those constitutional provisions, which exist in some of the states, that property shall not be taken or damaged for public use without just compensation, and it is urged that where these provisions exist, in some of the states at least, a doctrine has been held which sustains the plaintiff's contention here. Plaintiff's counsel also relies upon decisions of the English courts as sustaining his contention. The English statute pro-

vides for compensation to the owner of lands injuriously affected, and it has been held that this entitles one to compensation whose land was permanently diminished in value by an authorized obstruction to a street, although his lot was at a distance from the obstruction. *McCarthy v. Board*, L. R. (7 C. P.) 508; L. R. (7 H. L.) 243; *Railway Co. v. Walker's Trustees*, 7 App. Cas. 299. Mr. Sedgwick, in the eighth edition of his work on Damages (§ 1093), comments upon these decisions as follows: "The disposition made by the English courts of the question of redress for interference with access from private property to streets and highways is particularly deserving of attention. Under the rule already stated, if the owner had suffered no injury to his right of ownership he would have no right of action in respect of his interest in lands, if there had been no statutory powers; consequently he cannot maintain a claim to compensation under the statute. The claim, therefore, seems to be limited and defined by the right of access. If the access is taken away, or rendered less convenient, and the value of the lands depreciated, even though they do not immediately abut on the public highway or river, the plaintiff can recover; but if the obstruction is only temporary, or an inconvenience, diverting the public and causing a loss in custom or trade, the damage, as it would not have given the owner any right of action if there had not been any statutory powers, is not recoverable."

The plaintiff also cites cases in which the construction of a constitutional provision entitling the party to compensation where property is taken or damaged is claimed to be sufficiently broad to include the present case. The cases cited are: *Rigney v. City of Chicago*, 102 Ill. 64; *City of Chicago v. Taylor*, 125 U. S. 161; 8 Sup. Ct. Rep. 820; *Gottschalk v. Railroad Co.*, 14 Neb. 550; 16 N. W. Rep. 475; 17 N. W. Rep. 120; *Railway Co. v. Hazels*, 26 Neb. 364; 42 N. W. Rep. 93; *Railroad Co. v. Janecek*, 30 Neb. 276; 46 N. W. Rep. 478; *Harvey v. Railroad Co.*, 90 Ga. 66; 15 S. E. Rep. 783; *City of Omaha v. Kramer*, 25 Neb. 489; 41 N. W. Rep. 295; *Montgomery v. Townsend*, 80 Ala. 489; *Railroad Co. v. Williamson*, 45 Ark. 429; *Moore v. City of Atlanta*, 70 Ga. 611; *Town of Longmont v. Parker*, 14 Col. 386; 23 Pac. Rep. 443. In the case of *Town of Longmont v. Parker* it was held that, under a Constitution providing compensation for lands taken or

damaged, a landowner whose means of ingress and egress are interfered with by the construction of a ditch on the highway abutting his land is entitled to recover as damages depreciation of the property because of such ditch. Richmond, C., dissenting. In *Moore v. City of Atlanta* it was held that, under a similar Constitution, damages resulting to the abutting owner from a change in the grade of a street could be recovered. The same thing was held in *Montgomery v. Townsend*. In *Railroad Co. v. Williamson* it was held that the owner of premises abutting upon a street may recover from a railroad company damages resulting to his premises from the construction of a roadbed in its right of way along the street in such a manner as to obstruct access to the premises, though the owner has no interest in the fee. In the case of *City of Omaha v. Kramer* it was held that the construction of a viaduct on a street upon which the plaintiff's land abutted was such damage as could be recovered for, the court stating that, under the constitutional provision providing that property taken or damaged shall be paid for, the words "or damage" include all actual damage resulting from the exercise of the right of eminent domain which diminishes the market value of private property. The court repudiates the English rule and the rule adopted in Pennsylvania that, under such a provision, no damage can be recovered except such as the plaintiff would be entitled to sue for and recover at the common law if the act had not been authorized by statute. See, as to the English rule, 3 Sedg. Dam. § 1124; the Pennsylvania rule, *Railroad Co. v. Marchant*, 119 Penn. St. 541; 13 Atl. Rep. 690. In *Rigney v. City of Chicago* the city constructed a viaduct or bridge along Halsted and across Kinsey streets at their intersection, which was twenty feet west of plaintiff's premises, fronting on Kinsey street. The viaduct in question cut off all communication with Halsted street by way of Kinsey street, except by means of a pair of stairs at the intersection of the streets. Halsted street is one of the main thoroughfares of Chicago, on which is operated a line of horse railway. The evidence showed that the value of plaintiff's lot was largely depreciated. The question is considered at great length, and the majority of the court reach the conclusion that the plaintiff, under the facts stated, is entitled

to recover compensation for the injury to his property; the Constitution providing that private property shall not be taken or damaged for public use without just compensation. Three members of the court dissented from this opinion — Justices Scott, Craig and Sheldon. The Supreme Court of the United States, in *City of Chicago v. Taylor*, followed the decision of the state court, and affirmed a recovery by a plaintiff whose property was damaged by the construction of a viaduct on the street abutting the plaintiff's premises. Limitations have been placed upon the rule by the Supreme Court of Illinois. In *City of Chicago v. Union Building Assn.*, 102 Ill. 379, the plaintiff sought to enjoin the closing of a street three and one-half blocks from his premises, which act he claimed worked a peculiar injury to him. The court say: "It has been supposed in argument that our Constitution, in providing that property shall not be damaged for public use without due compensation, necessarily modifies these cases (referring to *Massachusetts*, *Pennsylvania*, *Iowa*, and other cases cited) to some extent, as affects the present question. We are of opinion that this supposition is not well founded." See, also, the case of *City of East St. Louis v. O'Flynn*, 119 Ill. 200; 10 N. E. Rep. 395. The counsel for the plaintiff argues that these cases were wrongly decided, as the court attempts to determine as a matter of law in each case whether damages have resulted. This only illustrates the difficulty in drawing any precise line, if it be admitted that one other than the abutting owner is entitled to recover damages for the obstruction or discontinuance of a public street. Indeed, it is not altogether clear that the line intended to be drawn by the Supreme Court of Illinois is not the one indicated, namely, between an abutting owner affected by the closing of a street adjacent to his premises and one whose property is incidentally affected by the closing of a street in another block. In *City of East St. Louis v. O'Flynn*, 119 Ill. 204; 10 N. E. Rep. 395, it is said: "The only question that can be considered in this court is purely a question of law. It is, can defendant as a matter of law be held liable to the plaintiff for damages resulting from the vacation of streets and alleys between Front and Fourth streets, the vacation being in another block in the city than that in which plaintiff's property is situated?" The court then considered the force and effect both of the constitutional provision and the stat-

ute of the state as bearing upon the subject; the constitutional provision being that private property shall not be taken or damaged for public use without just compensation, and the statute providing that when property is damaged by the vacation or closing of any street or alley the same shall be ascertained and paid as provided by law. The court say: "Here plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot are not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the 'same kind' of damage which would be sustained by all other persons in the city that might have occasion to go that way; and, although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action." The court held that he had no right of action. In *City of Chicago v. Union Bldg. Ass'n* it was held that the fact that property owners upon a street have been specially assessed as benefited by the opening of a street some blocks off and have paid assessments does not give them any special property in said street, any more than any other taxpayer, and gives them no equitable ground to enjoin the vacation of such part of the street. The same view was taken in *Kean v. City of Elizabeth*, 54 N. J. Law, 462; 24 Atl. Rep. 495. It was said: "It is assumed by counsel for prosecutrix that, because the prosecutrix was assessed for a benefit resulting from the opening of this street peculiar to herself, she got a vested right in the continued existence of the street, of which she could not be stripped without compensation. But this, I think, is more plausible than substantial. While the right she got may have been of peculiar benefit to her property, yet it was a right which she shared with the public. The privilege of using the street was shared by each member of the community. It may not have been of the same value to each member of the community, but the right to use the street was in each citizen the same. It was exclusively a public right, put under the control of the representatives of the public. It was subject to alteration or abolition

when, in the judgment of those to whom the public interests were confided, those interests demanded such action." It was held in that case that a person owning lands upon a part of a street not vacated is not deprived of any vested rights in property for which he is entitled to compensation by reason of such vacation.

A distinction may well be held to exist between the injury which results to an abutting owner, or another so situated that the means of ingress and egress to and from his premises are cut off by a discontinuance of a street, and one owning land upon another street or on the same street at a distance from the part of the highway discontinued. The subject has been considered by the Supreme Court of Massachusetts many times. In *Stanwood v. City of Malden*, 157 Mass. 17; 31 N. E. Rep. 702, damages were sought for a discontinuance of a part of Sumner street in Malden, which runs into Florence street obliquely just opposite the petitioner's land. It was said it is possible, if not probable, that the money value of plaintiff's property is diminished by diverting the stream of travel which formerly flowed towards it over Sumner street; and it was contended, on the authority of the English cases, and for the further reason that the laying out of the discontinued piece of street would have been a benefit for which the petitioner might have been assessed, that it would follow logically that a recovery should be had for its discontinuance. But the Supreme Court, following *Smith v. Boston*, 7 Cush. 254, denied the right. In *Smith v. Boston* it appeared that the plaintiff owned several lots in the city on or near Market street, and offered to prove that the value of each had been lessened and the rent of one or more of them diminished, but it appeared that no one of the lots bounded on that part of the street which had been discontinued. Chief Justice Shaw, in conveying the opinion of the court, said: "There is obviously a difficulty in laying down a general rule applicable to all cases. One limit, however, must be observed, which is that the damage for which a recompense is sought must be the direct and immediate consequence of the act complained of, and that remote and contingent damages are not recoverable. The inconvenience of the petitioner is experienced by him in common with all the rest of the members of the community. He may feel it more, in consequence

of the proximity of his lots and buildings. Still it is a damage of like kind, and not in its nature peculiar or specific. * * *

We do not mean to be understood as laying down a universal rule that in no case can a man have damages for the discontinuance of a highway unless his land bounds upon it, although, as applicable to city streets, intersecting each other at short distances, it is an equitable rule. A man may have a farm, store, mill or wharf, not bounding on a street, but communicating with it by a private way, so situated that he has no access to his property but by the public way. If this is discontinued he must lose the benefit of his estate or open a way at his own expense, which might be a direct and tangible damage consequent upon the discontinuance of the public way, and we are not prepared to say that he would not have a claim for damages under the statute." In McGee's Appeal, 114 Penn. St. 477; 8 Atl. Rep. 237, the court consider the effect of a constitutional provision which reads as follows: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works," etc. The court held that this gave no right of action to the owner of a lot whose property was incidentally injured by the vacation of a public street. In the case of Coster v. Mayor, 43 N. Y. 399, the city was authorized by act of the legislature to cause the removal of a bridge which was a portion of a street leading to plaintiff's lot, which act provides that the city should pay all damages to property caused by the improvement, and should enter into a contract and give a bond to the state to do so. The language of the act was substantially the same as that under consideration here. The court say: "'Damage' and 'claim' are words having a well-defined meaning in statutes and legal instruments. And for so much as they rightfully convey for so much is the city bound. 'What is a claim? It is, in just judicial sense, a demand of some matter, as of right, made by one person of another, to do or forbear some act or thing as a matter of duty.' The plaintiffs may claim no more of the city than the law will give them as a matter of right. The city need pay as much as the state should pay as a matter of duty." Considering the question of whether the plaintiffs had such a right which had been encroached upon, the

court say: "The plaintiffs further claim that the best approach to their property having been by the Hamilton street bridge, and that having been entirely removed by the agents of the state, a damage has resulted to their property for which the city is liable. No part of the bridge was on the property of the plaintiffs. They had no interest or right in it as property. There is left to the plaintiffs an approach to their property by the State street bridge, though less near, less easy, less commodious. The damage to the plaintiffs' property from this cause is entirely indirect and remote. It is not claimed to the contrary, and we shall assume that the state had right, by virtue of this act or from other source, to do this work, and in doing it to remove this bridge. The bridge, so far as the plaintiffs were interested in it, was but a part of a public street or highway. Over streets and highways the legislature has control, and may, when no private interests are involved or invaded, close them and altogether relinquish their use by the public. And if in the exercise of this right a street be discontinued, and the value of lands abutting on other parts of the street and on neighboring streets is lessened, it is not such an injury to the owner as to entitle him to damages." In *Glasgow v. St. Louis*, 107 Mo. 204; 17 S. W. Rep. 743, the plaintiff sought to enjoin the vacation of Twelfth street, one block south of property owned by plaintiff, lying between Thirteenth and Fourteenth streets. The situation of the property was not materially different from the property of plaintiff in the present case. The court say: "There is no doubt but a property owner has an easement in the street upon which his property abuts which is special to him and should be protected, but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property was surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief. Nor are the plaintiffs entitled to any relief by reason of the clause in the present Constitution which declares "that private property shall not be taken or damaged for public use without due compensation." To entitle them to relief because their property will be damaged, though not taken, they must show

a special injury. Here there is no physical interference with their property, nor is any right or easement connected therewith or annexed thereto affected. They will, therefore, suffer no injury which is special or peculiar to them. The inconvenience, if any in reality there is, is the same as that cast upon other persons. For these reasons the constitutional amendment furnishes them no ground for complaint."

We think the weight of authority in this country fully sustains the contention of defendant that such an injury as that resulting to the plaintiff here is one which he suffers in common with the general public, and is *damnum absque injuria*. But it is contended by the plaintiff that, unless the amendatory act is so construed as to give the plaintiff a right of action in the present case, the provision that damages may be recovered is rendered wholly nugatory, as it is urged that only such streets as are within the depot grounds are permitted to be vacated, and that there is no abutting owner who could be injuriously affected by the closing of such streets. And, as applied to the present case, such is possibly the result of this construction. But the act is general, and applies to all depot companies. The street which passes through depot grounds may be a *cul de sac*, and in such case the closing of a street might leave the owner of the property without any means of egress whatever. In such case, undoubtedly, his right to damage would be as clear for the interruption of his means of ingress and egress as would be that of the abutting owner for a similar interference with a like right. See opinion of Shaw, Ch. J., in *Smith v. Boston*, *supra*; *Pearsall v. Board*, 71 Mich. 438; 39 N. W. Rep. 578; *Goss v. Commissioners*, 63 Mich. 608; 30 N. W. Rep. 197; *Phillips v. Commissioner*, 35 Mich. 15.

The Circuit judge directed a verdict for the defendant on the ground that the plaintiff was not entitled to recover any damage for the closing of the street in question. We think this conclusion was right, and the judgment will be affirmed, with costs. The other justices concurred.*

* Reported in 57 N. W. Rep. 829.

Vacating streets — right to recover for damages to private property resulting therefrom.— Three cases in volume 5 of these reports relate to this question. *Heilscher v. Minneapolis*, 5 Am. R. R. & Corp. Rep. 115;

Glasgow v. St. Louis, 5 Am. R. R. & Corp. Rep. 192; Egerer v. New York Central, etc., R. Co., 5 Am. R. R. & Corp. Rep. 241. The authorities on the subject are collected in a note to the first of these cases. The following are recent cases on the subject:

A city which has discontinued part of a street is not liable in damage therefor to an owner of land which is diminished in value by the diversion of travel caused by closing the street, where the access from the land to the system of public streets remains substantially unimpaired. Stanwood v. City of Malden, 157 Mass, 17; 31 N. E. Rep. 702. To the same effect is State (Kean, Prosecutrix) v. City of Elizabeth, 54 N. J. L. 462; 24 Atl. Rep. 495.

In Levee District No. 9 v. Farmer, (Cal.) 35 Pac. Rep. 569, it was held that the vacation of a highway was not a taking or damaging of property abutting on the vacated way, requiring compensation to be first made to the owner, since he has no interest in such highway that is not common to the public, and must be held to have acquired and improved his property in view of the statute authorizing the vacation of such highways.

In Parker v. Catholic Bishop of Chicago, 146 Ill. 158; 34 N. E. Rep. 473, the plaintiff's premises abutted north on an alley which extended east to Oakley street. A branch alley, starting about opposite the north end of plaintiff's lots, extended north 122 feet to another east and west alley, also communicating with Oakley street. The first alley east of plaintiff's lots was vacated, so that access thereby to Oakley street was cut off, but plaintiff's premises did not abut upon the vacated part and she still had access to Oakley street from the rear of her lots by the other alleys mentioned. A statute of Illinois provided that "when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law." On a bill to enjoin the vacation it was held, first, that the law did not require the ascertainment and payment of damages as a condition precedent to the vacation of the alley, and, second, that plaintiff's damages were not different in kind from those suffered by the public generally, and consequently could not be the foundation of relief, either in law or equity. But while plaintiff's inconvenience, if she desired to pass from her lots to Oakley street was the same as would be suffered by any member of the public desiring to do the same, yet if the vacation of the alley in question had the effect of depreciating the value of her property, by reason of their being deprived of that means of access to Oakley street, then such depreciation was a special damage not suffered in common with the public. Consequently, while such damage would not amount to a *taking* of the plaintiff's property as long as she was left with an outlet, it would seem to fall within a statute expressly giving compensation for property damaged by the vacation. See 3 Am. R. R. & Corp. Rep. 271, 273.

LEEP v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, February 3, 1894.)

1. **CONSTITUTIONAL LAW. VALIDITY OF ACT REGULATING THE PAYMENT OF WAGES BY RAILROADS AND RAILROAD CONTRACTORS.** The right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended, since this would subvert the right to enjoy liberty, to acquire property, and to pursue happiness, declared to be inalienable rights by Constitution of Arkansas, article 2, section 3.

2. The legislature cannot make it unlawful for individuals to agree with each other that wages shall be paid at any time after the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a given day after the sale, since such a contract, as to the time of performance, is necessarily harmless, and of purely private concern.

3. Under the reserved power to alter and repeal all laws relating to the formation and organization of corporations, the legislature has the right to require railroad companies to pay for the labor of their employees when the same is fully performed.

4. Act March 25, 1889, which requires corporations, companies and persons engaged in the business of operating or constructing railroads and railroad bridges, and contractors and sub-contractors engaged in the construction of any such road or bridge, to pay their employees, on the day of discharge, the unpaid wages then earned by them at the contract rate, without abatement or deduction, is void in so far as it applies to natural persons, but valid in so far as it applies to corporations. Bunn, Ch. J., dissenting, on the ground that the act is entirely void.

5. **CONSTRUCTION OF ACT. MEANING OF WORDS "WITHOUT ABATEMENT OR DEDUCTION."** The requirement of the act that the wages earned be paid "without abatement or deduction," means without discount for paying in advance of the time fixed by the contract, and does not prevent the corporation from offsetting the damages sustained by the employee's failure to perform his contract.

6. **WHETHER ACT IS SPECIAL LEGISLATION.** The act is not special legislation, since it is general and uniform in its operation on all persons coming within the class to which it applies.

7. **CONSTRUCTION OF ACT AS TO PENALTY.** Act March 25, 1889, section 1, which provides that if the wages of a discharged employee be not paid to him on the day of his discharge, "then, as a penalty for non-payment," the wages of the employee shall continue at the same rate until paid, was intended to compensate the employee for the delay, and to punish his employer for failure to pay; and hence, though expressly termed a penalty, the additional compensation is exemplary damages, within the meaning of decisions that a justice of the peace has jurisdiction of actions for exemplary damages, but not for statutory penalties.

ACTION by S. P. Leep against the St. Louis, Iron Mountain and Southern Railway Company for wages and for a penalty for non-payment of the same. The action was originally brought in Justice's Court, where plaintiff had judgment for the full amount of his claim, but on appeal to the Circuit Court the penalty was not allowed, and he appeals.

Marshall & Coffman, for appellant. *Dodge & Johnson*, for appellee.

BATTLE, J. The St. Louis, Iron Mountain and Southern Railway Company is a corporation duly organized according to the laws of Arkansas, and is engaged in operating a railroad in this state. S. P. Leep was employed to work for it at the rate of thirty-five dollars per month of thirty days, and labored under his contract until the 9th of September, 1890, when he was discharged. On the same day he demanded of the company his unpaid wages that were then due, amounting, at the contract rate, to the sum of twenty-seven dollars and ninety cents. The company failed to pay then, but promised that it would on the 18th of September, 1890. Leep refused to wait until the day of the promised payment, and brought suit before a justice of the peace for the amount due to him, the twenty-seven dollars and ninety cents, and also for a penalty for the non-payment of the same on the day he was discharged, at the contract rate from the time of such discharge to the day of bringing the suit. He recovered a judgment for thirty-six dollars and sixty-one cents and costs. The defendant then appealed to the Pulaski Circuit Court. He recovered judgment in that court against the defendant for twenty-seven dollars and ninety cents and costs, but no penalty or damages, and, failing to recover the penalty, he appealed to this court.

He bases his claim to a penalty or damages upon the act of the general assembly, which is in the following words:

"SECTION 1. Whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or sub-contractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to

further employ any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid; provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

“Sec. 2. That no such servant or employee who secretes or absents himself to avoid payment to him or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

“Sec. 3. That any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty.”

This act applies to corporations, companies and persons engaged in the business of operating or constructing railroads or railroad bridges, and to contractors and sub-contractors engaged in the construction of any such road or bridge, and requires them to pay their employees, on the day of discharge, or on the refusal to further employ them, the unpaid wages then earned by them at the contract rate, without abatement or deduction. The object of the act is to make it unlawful for such companies, corporations, persons, contractors or sub-contractors to contract to pay the wages of those employed by them in the operating of railroads or in the construction of such roads or bridges at any time subsequent to the day on which the employees may be discharged, or on which such employer may refuse to longer employ them. In other words, it declares the wages shall be paid on such day, notwithstanding they may not be due according to the contract until a day subsequent. In this respect the act attempts to limit the right to contract. Is it constitutional?

The constitutionality of a legislative act is to be determined solely by reference to those limitations which the Constitution

imposes. No court ought to "declare a statute unconstitutional and void," says Judge Cooley, "solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown such injustice is prohibited, or such rights are guaranteed or protected by the Constitution." The judiciary and the legislative are co-ordinate departments of the government; neither of which has a right to invade the province of the other. In determining the validity of a statute the sole question for the courts to decide is one of power, not of expediency, justice or wisdom. In deciding such questions they should, in the spirit of the comity and good will that should prevail between the different departments of the government, resolve all doubts in favor of the constitutionality of the acts of the legislature; and, if any act be reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, should give it to the latter, on the presumption that the legislature did not intend to exceed its power. Cooley Const. Lim. (6th ed.) 157, 200, 203, 208; Sinking Fund Cases, 99 U. S. 700, 718; Munn v. Illinois, 94 U. S. 113; Powell v. Com., 114 Penn. St. 292; 7 Atl. Rep. 913; Railway Co. v. Humes, 115 U. S. 520; 6 Sup. Ct. Rep. 110.

According to the foregoing test, is the act under consideration constitutional? Section 3 of article 2 of the Constitution of this state declares: "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Section 8 of the same article ordains that no person shall "be deprived of life, liberty or property, without due process of law." Section 1 of the fourteenth amendment to the Constitution of the United States provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The rights to acquire and possess property necessarily include

the right to contract, for it is the principal mode of acquisition, and is the only way by which a person can rightfully acquire it by his own exertion. Of all the "rights of persons" it is the most essential to human happiness.

But the right to contract is not unlimited. The conflicting interests of individuals make this impossible. Rights in conflict with each other cannot be unlimited. Duties to persons, to society, the public and the government are imposed on every individual. Every man, when he enters into society, undertakes to perform these duties; and necessarily surrenders some rights or privileges on account of his relation to others. His right to contract becomes subject to these duties, among which is the duty to so conduct himself and use his own property as to not unnecessarily injure another. He submits himself to such restraints and burdens as may conduce to the general comfort, health and prosperity of the state. To conserve and enforce these rights and duties the government can impose such restrictions upon his actions as may be appropriate for that purpose. "This power inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which would arise in the absence of any controlling, regulating authority."

The legislature can control, to some extent, the right to contract in reference to property "clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large." By devoting his property to a use in which the public has an interest, the owner, in effect, grants to the public an interest in that use, and subjects himself to the control of the legislature for the common good, to the extent of the interest he has thus created. Upon this principle the legislature can fix the maximum of charges for the storage of grain in public warehouses, and for carriage of freight and passengers by common carriers. From the same source comes the power to regulate millers, bakers, hackmen, ferries, wharfingers, innkeepers and the like, "and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold." *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468; *Dow v. Beidelman*, 125 U. S. 680; 8 Sup. Ct. Rep. 1028; *Id.*, 49 Ark.

325 ; 5 S. W. Rep. 297 ; Mayor, etc., of Mobile v. Yuille, 3 Ala. 140. Upon the same principle it was held in *Waterworks v. Schottler*, 110 U. S. 347 ; 4 Sup. Ct. Rep. 48, "that it is within the power of the government to regulate the price at which water shall be sold by one who enjoys a virtual monopoly of the sale."

It has been held by the courts that the legislature can regulate or prohibit the sale or manufacture of oleomargarine for the purpose of protecting the public against fraud. *Powell v. Com.*, 114 Penn. St. 265 ; 7 Atl. Rep. 913 ; *Id.*, 127 U. S. 678 ; 8 Sup. Ct. Rep. 992, 1257 ; *State v. Addington*, 12 Mo. App. 214 ; 77 Mo. 110. Common carriers and telegraph companies cannot lawfully stipulate for exemption from responsibility for the negligence of themselves or their servants. *Railway Co. v. Lesser*, 46 Ark. 236 ; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397 ; 9 Sup. Ct. Rep. 469 ; *Western Union Tel. Co. v. Short*, 53 Ark. 434 ; 14 S. W. Rep. 649. No one can bind himself by an agreement not to engage in any particular business at any time or place. *Taylor v. Saurman*, 110 Penn. St. 4 ; 1 Atl. Rep. 40. Such contracts are void, because they are injurious to the public, contrary to public policy.

An act which made it unlawful for any person to transport or move, after sunset and before sunrise of the succeeding day, within certain counties, any cotton in the seed, but permitted the owner or producer to remove it from the field to his gin house, or other place of storage, was held by the Supreme Court of Alabama to be constitutional. The court hold that "its object was to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the lawmaking power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory." *Davis v. State*, 68 Ala. 58 ; *Mangan v. State*, 76 Ala. 60. Similar statutes have been held to be constitutional by other courts. *State v. Moore*, 104 N. C. 714 ; 10 S. E. Rep. 143 ; *Butcher, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746 ; 4 Sup. Ct. Rep. 652 ; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25 ; *Herdie v. Roessler*, 109 N. Y. 127 ; 16 N. E. Rep. 198 ; *Brechbill v. Randall*, 102 Ind. 528 ; 1 N. E. Rep. 362.

There can be no violation of the Constitution in the denial of

the right to contract to those who are incapable of binding themselves thereby. The term "contract" implies "the existence of a physical and moral power of assenting, as well as a deliberate and free exercise of such power. The absence of any of these capacities in either of the parties to a contract renders the person laboring under it incapable of binding himself thereby." Hence restrictions were thrown around the exercise of this right by seamen. They sustained to the master of a ship a servile relation. At common law they owed to him obedience and respect; and in case of disobedience or disorderly conduct the master could punish them, because discipline is necessary, and "without it the ship would always be in great peril, and no voyage could be successfully conducted." The authority of the master over them was like unto that of a parent over his child, or of a master over his apprentice. The employment, and the usages and customs regulating it, constituted them a servile class, as helpless and dependent in many respects as that of infants, and demanded the protection accorded to them.

The legislature has the power to prohibit the making of contracts, when it becomes necessary to protect the rights of others. As for example, it can provide by statute, as it did in Pennsylvania, that when the debtor and creditor, and a person or corporation owing money to the debtor, are residents of the state, it shall be unlawful for any citizen to send out of the state, by assignment or otherwise, for or without value, any claim against such debtor, with the intent to deprive him of his exemptions from execution by having collections out of such money made in the courts of another state; and that the assignor in such a case shall be liable in an action of debt to the person from whom any such claim shall have been collected by attachment or otherwise outside of the courts of the state of his residence for the full amount collected. *Sweeny v. Hunter*, 145 Penn. St. 363; 22 Atl. Rep. 653.

Another illustration of the power of the legislature to restrict the right to contract when it becomes necessary to protect others is furnished by the statutes of this state. It is the duty of every husband to take care of, support and protect his wife and children, and provide them with a home. To aid him in the discharge of this duty the Constitution of this state declares "that the home-

stead of any resident of this state, who is married or the head of a family, shall not," except in certain specified cases, "be subject to the lien of any judgment or decree of any court, or to sale under any execution or other process thereon. The obvious intent of this provision was to secure to every resident, who is married or the head of a family, a home, which he may improve and make comfortable, where his wife and children "may be sheltered and live beyond the reach of misfortunes which even the most prudent and sagacious cannot always avoid." For the purpose of protecting the wife in the enjoyment of this right the statutes of this state provide "that no conveyance, mortgage or other instrument affecting the homestead of any married man, shall be of any validity * * * unless his wife joins in the execution of such instrument and acknowledges the same."

Other instances of statutory regulations of the right to contract may be found in the statutes of many states prohibiting the taking of usury. They rest upon a traditional policy antedating Constitutions. They "proceed," says Mr. Justice Schiefel in *Fraser v. People*, 141 Ill. 171; 31 N. E. Rep. 395, "upon the theory that the lender and borrower of money do not occupy towards each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender." Lord Chief Justice Best, in 1825, in delivering the unanimous opinion of the twelve judges in the house of lords upon a question submitted to them under the English usury laws, said: "The supposed policy of the usury laws in modern times is to protect necessity against avarice; to fix such a rate of interest as will enable industry to employ with advantage borrowed capital, and thereby to promote labor and increase national wealth, and to enable the state to borrow on better terms than could be made if speculators could meet the ministers in the money market on equal terms." House of Lords, 3 Bing. 193. So at least they can be based on the right of the legislature to protect the public welfare.

The statutes of fraud are sometimes referred to for the purpose of showing the power of the legislature to control the right to contract. The object of these statutes was to prevent fraud

and perjuries. For this purpose some of them provide that certain contracts shall be in writing, in order to prevent controversies, litigation and false swearing as to the terms of the contract. Others declare that certain deeds, conveyances and transactions shall be void, because they defraud or tend to defraud innocent persons. They are based on the maxim, "*sic utere tuo ut alienum non laedas.*" None of them limit the right to contract, but regulate the exercise of it. Mansf. Dig. §§ 3371-3384. They clearly come within the power of the legislature to protect the rights of persons, prevent wrongs, and enforce honesty and fair dealing in the transactions of individuals.

We have thus far spoken of the limitations that can be imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition, and not on the absolute right to control. We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests on no other reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revocable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist, for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property and to pursue happiness, declared to be inalienable by the Constitution of the state.

When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof. In *State v. Goodwill*, 33 W. Va. 179; 10 S. E. Rep. 285, the Supreme Court considered the constitutionality of a statute of West Virginia, which declared "that it shall not be lawful for any person, firm, company, corporation or association engaged in mining coal, ore or other minerals, or mining and manufacturing them or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing. * * * to issue for the payment of labor any order or other paper notes whatsoever unless the same purports to be redeemable for its face value in

lawful money of the United States, bearing interest at a legal rate, made payable to employee or bearer, and redeemable within a period of thirty days by the person, firm, company, corporation or association giving, making or issuing the same." The court held that the statute was unconstitutional and void, and said: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hand; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell or convey property of any kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery, between liberty and oppression."

A Missouri statute made it unlawful (Rev. St. § 7058) "for any corporation, person or firm engaged in manufacturing or mining to issue for the payment of wages, any order, check or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value, in cash, or in goods, at the option of the holder, at the store or other place of business of the corporation, person or firm;" and provided that the order, check, memorandum or other evidence of indebtedness so issued should, upon presentation and demand within thirty days from date or delivery thereof, be redeemed by the person or corporation issuing the same, in goods, at the current cash market price for like goods, or lawful money,

as may be demanded by the holder. In *State v. Loomis*, 115 Mo. 307; 22 S. W. Rep. 350, the Supreme Court of Missouri held this statute unconstitutional. Similar statutes were held unconstitutional in *Godcharles v. Wigeman*, 113 Penn. St. 431; 6 Atl. Rep. 354; *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 118; 10 S. E. Rep. 288; *Ramsey v. People*, 142 Ill. 380; 32 N. E. Rep. 364; and *Braceville Coal Co. v. People*, 147 Ill. 66; 35 N. E. Rep. 62.

In *Com. v. Perry*, 155 Mass. 117; 28 N. E. Rep. 1126, the statute under consideration provided that "no employer shall impose a fine upon, or withhold the wages or any part of the wages of, an employee engaged in weaving, for imperfections that may arise during the process of weaving." The court held that the statute was unconstitutional, and in doing so said: "Article 1 of the declaration of rights of the Constitution of Massachusetts enumerates among the natural inalienable rights of men the right of acquiring, possessing and protecting property. * * * The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is, therefore, protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them or impair the obligation, violates fundamental principles of right which are expressly recognized in our Constitution. If the statute is held to permit a manufacturer to hire weavers and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently, and fails to perform his contract; for it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that

the remedy of the employer for their dereliction shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to every one when it declares that he has a natural inalienable right of acquiring, possessing and protecting property. Whichever interpretation be given to this part of the act we are of opinion that it is unconstitutional."

In *Railway Co. v. Wilson*, (Tex. App.) 19 S. W. Rep. 910, it appears that the legislature of Texas passed an act providing that, in the event a railroad company shall refuse to pay, under certain circumstances, its indebtedness to an employee, within fifteen days after demand thereof, it shall be liable to pay such employee twenty per cent on the amount due him for damages, in addition to the amount due, and that such damages shall not be less than five dollars nor more than \$100. The Supreme Court of Texas held the act unconstitutional, and, among other things, said: "Article 10, section 2, of the State Constitution declares that all railroads are public highways, and railroad companies common carriers; that the legislature shall pass laws to regulate freight and passenger tariffs, to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and, to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable. * * * There is no question as to the scope of this section of our Constitution. Its provisions necessarily refer to and contemplate all injuries to the public arising out of a violation of duties due by the railway company to the public as a common carrier. Within this broad field it rests with the legislature to determine what are those duties to the public, and what constitute abuses and injuries, and also what remedies are necessary to prevent them; and to decide whether the abuses shall be corrected through statutes which declare the act or acts to be a crime punishable as such, or whether the act or acts shall be corrected through a civil action with punitive damages. * * * But when we consider the relation of railway companies to their own servants, both as to acts of employment and payment, we find a

field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons, and which cannot be contemplated or included within the scope of section 2, article 10. * * * We think the position taken by appellant is correct, and section 2, article 10, contemplates only the public duties of railways, and excludes all right of interference with the employment or payment of their servants."

The Texas act, as it appears from the quotation we have made, was held to be unconstitutional because the Constitution of Texas confined legislation in respect to railroads to the duties they owe to the public as common carriers, and excludes all right of interference by the legislature with the employment or payment of their servants. Article 10, section 2 of the Texas Constitution, so far as it is set out in the last case referred to, is substantially incorporated into our Constitution, except there is no provision in ours expressly authorizing the establishment of means and agencies with power to enforce it as to railroads, and it does not appear in the opinion in that case that there is any power reserved in Texas to the legislature to amend or repeal charters.

An Indiana statute "forbade the execution of contracts waiving the payment of wages in money." This statute was held to be constitutional in *Hancock v. Yaden*, 121 Ind. 366; 23 N. E. Rep. 253, on the ground that it "protected and maintained the medium of payment established by the sovereign power of the nation."

A statute of West Virginia prohibited the payment of employees in paper redeemable otherwise than in lawful money, and another provided that coal should be weighed and measured, before it is screened, in a certain way, and that all coal paid for by weight shall be paid for according to such weight at the price agreed on, and that all coal paid for by measure shall be paid for according to such measure at the contract rate. The court, in *Peel Splint Coal Co. v. State*, (W. Va.) 15 S. E. Rep. 1000, held that these statutes were constitutional, two judges dissenting. The court said: "We base this decision in this case—*First*, upon the ground that the defendant is a corporation in the enjoyment of unusual and extraordinary privileges, which enables it and similar associations to surround themselves with a vast retinue of laborers,

who need to be protected against all fraudulent or suspicious devices in the weighing of coal or in the payment of labor; *secondly*, the defendant is a licensee, pursuing an avocation which the state has taken under its general supervision for the purpose of securing the safety of employees by ventilation, inspection and governmental report, and the defendant, therefore, must submit to such regulations as the sovereign thinks conducive to public health, public morals or public security."

Hancock v. Yaden, *supra*, and Peel Splint Coal Co. v. State, *supra*, are against the weight of authority, but they do not hold that the legislature has the absolute power to limit the right to contract.

The legislature cannot regulate or restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a day subsequent to the sale. Such a contract as to the time of performance is necessarily harmless, of purely and exclusively private concern, and cannot affect any one except the parties. It is an important means used in the acquisition of property, which sells for more on time than for cash. Labor commands higher wages when they are payable in the future than it does when they are paid at the time of performance. A large portion of the business of the world is transacted on a credit. Nations, states, counties, towns and persons contract debts payable in the future. Property is sold on time under executions, judgments and decrees of courts. The right of persons to sell or labor on a credit is everywhere and by all recognized as legitimate, and is protected by the Constitution in the declaration that the right to acquire and possess property is inalienable.

But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, either expressly or as incidental to their existence; and these may be modified or diminished by amendment or extinguished by the repeal of the charters.

The Constitution of 1874 (art. 12, § 6) ordains: "Corpora-

tions may be formed under general laws, which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." The Constitution of 1868 declared: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." Under these Constitutions the general assembly has enacted statutes providing for the organization of corporations, and from them the corporations of this state derive their powers, subject to the power of the legislature to change them by amending the laws under which they were organized.

As said by Mr. Justice Miller in *Greenwood v. Railroad Co.*, 105 U. S. 13, 19: "A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power."

Continuing, he said, in the same case: "As early as 1806, in the case of *Wales v. Stetson*, 2 Mass. 143, the Supreme Court of that state made the declaration 'that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.' In *Dartmouth College v. Woodward*, 4 Wheat. 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with dissatisfaction, have never been overruled by this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 1 Cranch, 87, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private, as dis-

tinguished from public, corporations by the legislative acts under which their existence was authorized, and a right to exercise the functions conferred upon them by the statute were, when accepted by the corporators, contracts, which the state could not impair. It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the state legislature could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that, when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract and could not, therefore, impair its obligation."

In order to avoid the consequences of the rule laid down in the Dartmouth College case, many states have availed themselves of Judge Story's suggestion. In chartering the Union Mining Company the legislature of Maryland reserved the right to amend or repeal its charter at pleasure. Afterwards it passed an act (Laws 1880, chap. 273) providing "that every corporation engaged in mining or manufacturing, or operating a railroad in Allegheny county, and employing ten or more hands, shall pay its employees the full amount of their wages in legal tender money of the United States," and that "every such employee shall be entitled to receive from any such corporation employing him the whole or so much of the wages earned by him as shall not have been actually paid to him in legal tender money of the United States, without set-off or deduction of his demand for or in respect of any account or claim whatever." The Union Mining Company was sued after the enactment of this act by Shaffer and Mann for wages due to its employees. Mr. Justice Irving, in commenting

on this act, in that case, said: "It being conceded that the legislature, when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the legislature could enact a law prohibiting the corporation from paying its employees otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money. * * * The acceptance by the corporation of a charter with the reservation of the right to alter and amend, made that provision a part of the contract, which, as between the legislature and it, as a private corporation, it must be understood to be. A corporation has no inherent or natural right like a citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferable from the powers actually granted, or such as may be indispensable to the exercise of such as are granted. A private corporation is only a quasi individual, the pure creation of the legislative will, with just such powers as are conferred expressly or by necessary implication, and none others. Whatever, therefore, may have been the mischief intended to be reached and prevented by this law by restrictions imposed on the corporation, it was competent for the legislature by this law, which operates as an amendment of its charter, to accomplish." *Shaffer v. Mining Co.*, 55 Md. 74.

A statute of Rhode Island (Rev. St. chap. 125, § 14) provides: "All acts of incorporation hereafter granted may be amended or repealed at the will of the general assembly, unless express provisions be made therein to the contrary." The Brown & Sharpe Manufacturing Company was incorporated by the general assembly of Rhode Island for the purpose of manufacturing machinery, subject to a chapter of which this statute was a part. After the incorporation of it, the legislature passed an act requiring corporations to pay weekly the employees engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by inevitable casualty. In *State v. Brown & Sharpe Manufacturing Co.*, (R. I.) 25 Atl. Rep. 246, which was an action for the violation of this act, the Supreme Court of Rhode Island held that the act was constitutional, and that it operated as an amendment to the charter of the corporation sued, as it was a reasonable exercise of the power to amend.

In the Sinking Fund Cases, 99 U. S. 700, "the question was whether congress had the constitutional power to enact a law compelling the Union Pacific and Central Pacific Railroad Companies to set aside a portion of their current earnings as a sinking fund for the purpose of meeting a very large indebtedness secured by mortgage upon the roads, and payable at a future day. The majority of the court held that the legislation was valid as an exercise of the general legislative powers of the government, and also because the right to alter or amend the charters of the companies had been expressly reserved to congress."

In commenting on the reserved power to amend or repeal the charters of corporations, in that case, Chief Justice Waite, in delivering the opinion of the court, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller v. State*, 15 Wall. 498, it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and creditors, and for the proper disposition of its assets; and again, in *Holyoke Co. v. Lyman*, 15 Wall. 519, 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*, 15 Wall. 459, he said the reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities, derived by its charter directly from the state; and, again, as late as *Railroad Co. v. Maine*, 96 U. S. 510, by the reservation * * * the state retained the power to alter it [charter] in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges and immunities. Mr. Justice Swayne, in *Shields v. Ohio*, 95 U. S. 324, says, by way of limitation, the alterations must be reasonable. They must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of an amendment

or alteration." The rules as here laid down are fully sustained by authority.

In speaking of the reserved power to amend or repeal the charters of corporations, Mr. Justice Gray, in delivering the opinion of the court in *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 451, said: "It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights. Under such a clause, for instance, the legislature may make the stockholders of an incorporated bank liable for the future debts of the corporation. *Sherman v. Smith*, 1 Black, 587; *In re Lee & Co.'s Bank*, 21 N. Y. 9. It may vary the measure, and thus enlarge the proportion, of the profits which a mutual life insurance company is required by the terms of its charter to pay to a charitable institution. *Massachusetts General Hospital v. State Assurance Co.*, 4 Gray, 227. Railroad corporations may be compelled, by general or special laws, to make changes in the levee, grade and surface of the roadbed, new structures at crossings of other railroads or of highways, or station houses at particular places, in a manner and to be enforced by forms of process different from those provided for or contemplated by the original charter or the general laws in force when that charter was granted. *City of Roxbury v. Railroad Corp.*, 6 Cush. 424; *Fitchburg R. Co. v. Grand Junction R. Co.*, 4 Allen, 198; *Com. v. Eastern R. Co.*, 103 Mass. 254; *Railroad Co. v. Brownell*, 24 N. Y. 345, overruling *Miller v. Railroad Co.*, 21 Barb. 513."

In *Water Works v. Schottler*, 110 U. S. 347; 4 Sup. Ct. Rep. 48, it appears that the Constitution of the state of California "provided that corporations might be formed under general laws, and should not be created by special act, except for municipal purposes; and that all laws, general and special, passed pursuant to that provision, might be, from time to time, altered and repealed. A general law was enacted by the legislature for the

formation of corporations for supplying cities, counties and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners, to be appointed in part by the corporation and in part by the municipal authorities. The Constitution and laws of the state were subsequently changed so as to take away from corporations which had been organized and put into operation under the old Constitution and laws the power to name members of the boards of commissioners, and so as to place in the municipal authorities the sole power of fixing rates for water." The court held that "these changes violated no provisions of the Constitution of the United States."

Chief Justice Waite, speaking for the court said : "The Spring Valley Company is an artificial being, created by or under the authority of the legislature of California. The people of the state, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all times to alteration or repeal. * * * In California the Constitution put this reservation in every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body." See *State v. Brown & Sharpe Manuf'g Co.*, (R. I.) 25 Atl. Rep. 246.

It is obvious that the legislature cannot, under the power to amend, take from corporations the right to contract; for it is essential to their existence. It can regulate it when the interests of the public demand it, but not to such an extent as to render it ineffectual, or substantially impair the object of incorporation. The Constitution of this state, in reserving the power to amend or repeal, expressly provides that it may be exercised whenever, in the opinion of the legislature, the charter "may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the corporators." Art. 12, § 6.

Whenever the charters of railroad companies become obstacles in the way of the legislature so regulating their roads as to make them subserve the public interest to the fullest extent practicable, their charters are, in that respect, injurious to the citizens of the state, and can be amended as to defects in such manner as will be just to the corporators; for they are organized for a public pur-

pose, and their roads are declared by the Constitution to be public highways, and they are made common carriers. They are clothed with a public trust, and in many respects are expressly subjected by the Constitution to the control of the legislature. There is no enterprise in which the public is so largely interested as it is in the successful and efficient operation of railroads. With the trust with which they are clothed is imposed the duty to serve the public as common carriers in the most efficient manner practicable. For this reason the legislature may impose on them such duties as may reasonably be calculated to secure such results. Being created by statute, the legislature may so change them by amendment as to make them subserve the purposes for which they were created. If the legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed, at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would, nevertheless, under such circumstances, have the right to do so under the reserved power to amend.

But we do not mean, by holding as we do, to intimate that the legislature can, by way of amendment, fix or limit the compensation of the employees of railroad companies. That might seriously affect one of the principal charter rights of the companies, and thereby substantially impair the object of their incorporation. Such a power would be subversive of the right, and, when exercised to its fullest extent, would leave to the corporation the privilege of selecting its employees without the right of contracting with them. An amendment to that extent would be, manifestly, unjust to the companies, and violative of the Constitution, which, while it grants the right to amend when, in the opinion of the legislature, the charter is injurious to the citizens, it limits the right to do so to amendments that are just to the corporators. The act in question is not subject to that imputation. It is pros-

pective in its operation, and leaves to the corporations the right of making contracts with their employees on advantageous terms.

Is the act before us a proper amendment? It provides, among other things, that whenever any corporation "engaged in the business of operating or constructing any railroad or railroad bridge" shall discharge with cause any servant or employee thereof, "the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge;" "and if the same be not paid on such day then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid." This provision is susceptible of two constructions, one of which makes the act require the corporation to pay the employee all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby. If this be its intention, it is unconstitutional, because its enforcement might take property from the corporation without due process of law, for the employee is not entitled to the stipulated wages until he has performed the contract. He may have damaged his employer by the failure to do so in a sum larger than the wages he would have been entitled to receive in the event he had complied with his agreement. To compel the corporation, in such a case, to pay any sum whatever would be a deprivation of property without due process of law. The same would be equally true if the corporation should be compelled to pay full wages when the damage caused by the non-performance of the contract does not exceed them. *Com. v. Perry*, 155 Mass. 117; 28 N. E. Rep. 1126. Such an amendment of the charters of corporations is clearly unjust to the corporators.

The other construction is more reasonable. It makes the words "without abatement or deduction" mean "without discount." The legislature evidently thought that the employee might receive money or property in the course of his employment in part payment for his labor, and evidently intended that the wages thus paid should not be repaid. A strict construction of the words "without abatement or deduction" would deprive the corporation of a credit for the money or property in a settlement with

its employee for his services. Then, again, the act requires the corporation to pay only the unpaid wages earned, at the contract rate, at the time of his discharge. Stipulated wages cannot be earned except by the performance of the contract by which the employer agrees to pay them. Obviously, then, the act means by the words "without abatement or deduction" that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment. When construed in this manner, this provision of the act is constitutional, and it is our duty to so construe it.

Tested by the principles of law we have indicated, the act under consideration is unconstitutional so far as it affects natural persons. As to corporations it is a valid statute. It does not seriously impair their right to contract, but leaves them to contract with their employees on profitable terms.

So much of the act as is unconstitutional can be eliminated, and the remainder stand. *State v. Marsh*, 37 Ark. 356; *Railway Co. v. Worthen*, 46 Ark. 312; *State v. Deschamp*, 53 Ark. 490; 14 S. W. Rep. 653; *Davis v. Gaines*, 48 Ark. 370, 383; 3 S. W. Rep. 184.

After this elimination, so much of the first section of the act as remains in force reads as follows (Act March 25, 1889): "Section 1. Whenever any corporation, engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable, on the day of such discharge or refusal to longer employ; and if the same be not paid on such day then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid. Provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time."

It cannot be truthfully said that so much of the act as we find to be in force is unconstitutional because it interferes with the rights of employees to make such contracts with corporations as

they see fit. As said in *State v. Brown & Sharpe Manufacturing Co.*, (R. I.) 25 Atl. Rep. 253: "No inhibition is placed upon employees to make such contracts as they choose, with any person or body, natural or artificial, that is authorized to contract with them. But corporations are artificial bodies, and possess only such powers as are granted to them, and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into."

The "act being general and uniform in its operation upon all persons coming within the class to which it applies, it does not (if amendments to charters can) come within that special legislation prohibited by the Constitution; for it applies to and embraces all persons 'who are or may come into certain situations and circumstances,' and is general and uniform; not because it operates upon every person in the state, for it does not, but because every person who is brought within the relations and circumstances provided for, is affected by the law." *Railway Co. v. Hanniford*, 49 Ark. 291; 5 S. W. Rep. 294; *McAunich v. Railroad Co.*, 20 Iowa, 342; *Railway Co. v. Mackey*, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; *Railway Co. v. Beckwith*, 129 U. S. 27; 9 Sup. Ct. Rep. 207; *In re Oberg*, 21 Oreg. 406; 28 Pac. Rep. 130; *Hawthorn v. People*, 109 Ill. 311; *Youngblood v. Savings Co.*, 95 Ala. 521; 12 South. Rep. 579; *Cooley Const. Lim.* (6th ed.) 480, 481.

This action was brought before a justice of the peace for the recovery of wages earned, and the penalty or damages allowed by the act on account of the non-payment thereof from the time the wages were due to the day of bringing the suit. The question arises, did the justice of the peace have jurisdiction? We have held that a justice of the peace did not have jurisdiction in an action for the recovery of a statutory penalty. *Telegraph Co. v. Lovejoy*, 48 Ark. 301; 3 S. W. Rep. 183. On the other hand, the jurisdiction of justices of the peace in actions for the recovery of punitive or exemplary damages has been sustained. The question, then, is, is the amount allowed to the employee, in addition to the wages earned, a penalty or exemplary damages? The answer depends on the interpretation of so much of the act as is in the following words: "And if the same (wages) be not

paid on such day then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid." According to the act, the wages earned become due when the employee is discharged or the employer refuses to longer employ him. The additional amount is allowed on account of the failure to pay the wages when due, and is regulated according to the length of the delay of payment. It is allowed for a double purpose — as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages. *Day v. Woodworth*, 13 How. 363; *Railway Co. v. Humes*, 115 U. S. 512; 6 Sup. Ct. Rep. 110; *Railway Co. v. Beckwith*, 129 U. S. 34-36; 9 Sup. Ct. Rep. 207; *Sedg. Dam.* (6th ed.) 35. The name given to it by the act cannot change it. Our conclusion is, the additional amount is allowed as exemplary damages, and that the justice of the peace had jurisdiction in this action.

The judgment of the Circuit Court is, therefore, reversed, and judgment will be rendered by this court in favor of appellant against appellee for twenty-seven dollars and ninety cents, and three dollars and fifty cents as exemplary damages, the amount sued for, and all his costs.

BURN, C. J. (*dissenting*). The constitutionality of the act entitled "An act to provide for the protection of servants and employees of railroads," approved March 25, 1889, is called in question by the plea of the appellee company, which was sustained in the court below, and the appellant appeals to this court. The majority of the court holds that the act in question, in so far as it affects private individuals, is unconstitutional, but that, in so far as it affects corporations, it is constitutional; and, furthermore, that it is divisible, so that the unconstitutional part may be eliminated and the valid part may stand. The court also holds that the act in fact does not interfere with the right to contract, but only affects some of its incidents, if I fully comprehend its meaning. From the decision of the majority of the judges I feel constrained to dissent, for reasons that follow.

Since the court, in its well-considered opinion, holds that the act in question, according to the weight of authority, cannot stand

upon the ground that it is a legitimate expression of the police or of any of the other great powers said to be inherent in government, I am relieved of the necessity of discussing the question involved from that standpoint, and, therefore, address myself directly to the consideration of the constitutional provision subjecting incorporation statutes to the legislative power of alteration and repeal on the one hand, and of alteration, revocation and amendment of charters on the other, to be found in section 6, article 12 of the Constitution, from which, and from which alone, the court derives the authority to enact the act in question and similar acts. The act is as follows: "Section 1. Whenever any railroad company, or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or sub-contractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid. Provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time. Sec. 2. That no such servant or employee who secretes or absents himself to avoid payment to him or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment. Sec. 3. That any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty. Sec. 4. That this act shall take effect and be in force from and after its passage." The constitutional provision referred to is in these words, viz.: "Art. 12, § 6. Corporations may be formed under general laws, which laws may, from time to time, be altered

or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." It is stated in the opinion of the court that the act would be treated as amendatory of our incorporation laws, and thus it was thought to give it the effect of accomplishing what is thought to be provided for in the section of the Constitution quoted above. At the threshold of the discussion, therefore, we are confronted with a question of the most serious character. It is this: Can this court arbitrarily treat one statute as amendatory of another? That is to say, is it not a legal proposition of itself whether any statute is amendatory of another, aside from the idea of both dealing with the same or kindred subjects? It will be observed that the act in question does not in terms refer to any other statute, and, this being so, can any other statute be said to be amended by it? Section 23, article 5 of the Constitution is in these words, viz.: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be reinstated and published at length. Now, if a law referring to a previous law by title only is not to be considered as amendatory of it, how much more true is it that a subsequent law, which does not refer even to the title of a former law, is not amendatory of the existing or former law. The prohibition contained in this section of the Constitution was not meant as an idle saying, a mere flourish of high-sounding words, but was intended to subserve a great purpose — the protection of the citizen against surreptitious legislation. Nor has this court, or the courts of other states, treated this and similar provisions as light and meaningless things. *Beard v. Wilson*, 52 Ark. 290; 12 S. W. Rep. 567; *Havis v. Jefferson*, (Ark.) 14 S. W. Rep. 1101; *Watkins v. Eureka Springs*, 49 Ark. 131; 4 S. W. Rep. 384; *Judson v. City of Bessemer*, (Ala.) 6 South. Rep. 267; *State v. City of Trenton*, 53 N. J. L. 566; 22 Atl. Rep. 731; *Board of Com'rs v. Aspen Mining & Smelting Co.*, (Col. App.) 32 Pac. Rep. 717. From the decisions on the subject we gather this principle: that an act as an inde-

pendent law, may not be objectionable on constitutional grounds, and yet as an amendment of some existing law, it may be invalid. The rule is a reasonable one, because no law should be altered or amended without something appears in the amendatory act to give notice to the public of a change in the original law, while if the new act is intended as an independent act, the original act is not affected, and there is nothing to take notice of. This, perhaps, is enough to say on this part of the subject.

The majority of the court, treating the act in question as an independent act, would hold it unconstitutional for reasons assigned in the opinion, which reasons we think sound and incontrovertible. But the majority of the court, treating the act in question as amendatory of our General Incorporation Laws (the court does not say which one, for there are two or more), holds it to be constitutional under the power reserved to the legislature in the last sentence (§ 6, art. 12 of the Constitution), and I have endeavored to show that the act can have no place as an amendment, because it does not show a compliance with the Constitution in the manner of its enactment as such amendment. The last sentence of the 6th section of article 12 of the Constitution manifestly refers to corporations created and to be created by special acts of the legislature, judging from the words employed and the context. Each charter is then made the subject of legislative alteration, revocation and amendment, in case it becomes injurious to the citizens of the state, and provided it was revocable at the adoption of the Constitution, if already in existence. The charters "hereafter to exist" were doubtless those special charters conferred by legislation to be expressed in special acts. Now, it does not appear in this case what kind of a corporation the appellee company is, whether it was created under our General Incorporation Laws or by special act of the legislature. As a matter of common knowledge it may be assumed, however, that it was created by special act, since it is now forty or more years since it became a matter of public concern, and since it had its origin at a time when there was no General Incorporation Law in this state. There could, then be no grant of corporate powers for strictly private purposes. All such were considered in conflict with the constitutional prohibition of monopolies. Strictly public, or municipal, and quasi public, such as railroad corporations, were all that were

allowable. The former were strictly at the will and pleasure of the legislature; the latter were the result of contract between the state and corporators, and by their contracts were both state and corporations to be governed. *State v. Curran*, 12 Ark. 321. Of this latter class, presuinably, was the appellant company; and to show that its charter is the subject of legislative revocation or amendment we must look to the language of the contract — the charter — which does not appear in evidence in this cause.*

Constitutional law — validity of act regulating the payment of wages by specified corporations.—The authorities on this question are extensively reviewed in the principal case. A recent case in Illinois arose upon a statute which provided “that every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation, and every incorporated express company and water company, shall pay weekly each and every employee engaged in its business the wages earned by such employee to within six days of the date of such payment; provided, however, that if at any time of payment any employee shall be absent from his regular place of labor he shall be entitled to said payment at any time thereafter upon demand.” Contracts in conflict with the statute were forbidden. In a suit for a penalty prescribed by the statute, it was held to be unconstitutional. The court says, “There can be no liberty, protected by government, that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject to the restraints necessary to secure the same right to all others. The fundamental principle upon which liberty is based in free and enlightened government is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such a vocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Frorer v. People*, 141 Ill. 171; 31 N. E. Rep. 395; *Com. v. Perry*, 155 Mass. 117; 28 N. E. Rep. 1126; *People v. Gillson*, 109 N. Y. 389; 17 N. E. Rep. 343; *Live Stock, etc., Ass’n v. Crescent City, etc., Co.*, 1 Abb. (U. S.) 388; *Slaughter House Cases*, 16 Wall. 36; *Godcharles v. Wigeman*, 113 Penn. St. 431; 6 Atl. Rep. 354; *State v. Goodwill*, 33 W. Va. 179; 10 S. E. Rep. 285. Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it. And the right of property preserved by the Constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which

* Reported in 25 S. W. Rep. 76.

each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. * * * The act under consideration applies not to all corporations existing within the state, or to all that have been or may be organized for pecuniary profit under the General Incorporation Laws of the state. There is no attempt to make a distinction between corporations and individuals who may employ labor. The slightest consideration of the act will demonstrate that many corporations that may be and are organized and doing business under the laws are not included within the designated corporations. No reason can be found that would require weekly payments to the employees of an electric railway that would not require like payment by an electric light or gas company; to a corporation engaged in quarrying or lumbering that would not be equally applicable to a corporation engaged in erecting, repairing or removing buildings or other structures; to mining that would not exist in respect of corporations engaged in making excavations and embankments for roads, canals or other public or private improvements of like character; that will apply to a street or elevated railway that will not make it equally important in other modes of transportation of freight and passengers. The public records of the state will show, and it is a matter of common knowledge, that very many corporations have been organized and are doing business in the state which necessarily employ large numbers of men that are not included within the act under consideration. The restriction of the right to contract affects not only the corporation, and restricts its right to contract, but that of the employee as well. We need not repeat the argument of the *Frerer* case upon this point. An illustration of the manner in which it affects the employee, out of many that might be given, may be found in the conditions arising from the late unsettled financial affairs of the country. It is a matter of common knowledge that a large number of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories or workshops to be open and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this state, and under this law, no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the state might do. The corporations would be prohibited entering into such a contract, and, if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. They would, by the act, be practically under guardianship; their contracts void-

able, as if they were minors; their right to freely contract for and to receive the benefit of their labor, as others might do, denied them.

“But, treating the restrictions as affecting the corporations only, it is insisted that the reservation of authority by the general assembly in section 9 of the General Incorporation Act (Chap. 32, Rev. St.) authorized the passage of the act in question. That section provides: ‘The general assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under this act.’ It is said this section entered into and formed a part of the contract under which the grant of the corporate franchise was conferred upon appellant company, it having been organized under the general law. It was expressly held that the reservation of the right to alter, amend or repeal the charter entered into and formed a part of the contract between the state and the corporation chartered under the Constitution of 1848, and that the power reserved might be constitutionally exercised. *Butler v. Walker*, 80 Ill. 345. And undoubtedly the same construction should be placed upon the reservation of power in the section quoted. But by section 1, article 11, of the Constitution it is provided: ‘No corporation shall be created by special laws, or its charter extended, changed or amended, * * * but the general assembly shall provide by general laws for the organization of all corporations hereafter to be created.’ The manifest intention of this provision of the Constitution was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special acts, applying to particular corporations only, and not to the general body of corporations created under the act, would fall within the prohibition of this section. By the General Incorporation Law appellant company was granted the right to contract as a corporation in and about the business for which it was organized. A restriction of its right to thus contract is necessarily an amendment or change of its corporate powers and functions of its charter. If, therefore, the restriction is held to fall within the power reserved in section 9 of the act, it must, in view of the constitutional provision, be construed as reversing the power to prescribe such regulations and provisions as the legislature may deem advisable by general law. The act under consideration, not being a general law, is, therefore, not a warranted exercise of power. We need not extend this opinion by further discussion. The right to contract necessarily includes the right to fix the price at which labor will be performed, and the mode and time of payment. Each are essential elements of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large is deprived of liberty and property.” *Braceville Coal Co. v. People*, 147 Ill. 66; 35 N. E. Rep. 62.

HUGHES v. CITY OF LAWRENCE.

(Supreme Judicial Court of Massachusetts, February 27, 1894.)

1. **MUNICIPAL CORPORATIONS. WHEN ICE ON SIDEWALK AN ACTIONABLE DEFECT.** A sidewalk is defective if, in consequence of its construction, some special cause for the formation of ice exists rendering the sidewalk unsafe, though the ice is smooth and not accumulated in ridges; and the jury is warranted in finding that a gutter about fourteen inches wide and one and one-half inches deep, extending across the sidewalk, is a defect.

2. **WHEN VERDICT OF JURY CONCLUSIVE AS TO FACTS.** In an action by a pedestrian for injuries alleged to have been caused by falling on the ice in the gutter, where the evidence is conflicting as to whether plaintiff fell on the ice in the gutter, or near it, and the attention of the jury is directed to the matter, their verdict is conclusive.

3. **SUFFICIENCY OF NOTICE OF THE ACCIDENT.** The fact that the notice to defendant city designated the place where plaintiff fell as situated two feet from the gutter did not render it insufficient, when it fully described the scene of the accident, and there was no intention to mislead, and defendant was not misled.

ACTION by Sarah Hughes against the city of Lawrence for injuries sustained by plaintiff by falling on a sidewalk in defendant city. Verdict and judgment for plaintiff. Defendant excepts.

Chas. A. De Courcy and Walter Coulson, for plaintiff.
Charles U. Bell and Wilbur E. Rowell, for defendant.

MORTON, J. It has been held that a condition of mere slipperiness upon a well-constructed sidewalk, due to natural causes alone, and not to an accumulation of ice and snow, did not constitute a defect in the way (*Stanton v. Springfield*, 12 Allen, 566; *Billings v. Worcester*, 102 Mass. 329) but that a way would be defective if so constructed, or if its condition was such, that there was, in consequence thereof, some special cause for the collection or formation of ice in a particular locality, and the way was thereby rendered unsafe and dangerous, though the ice was smooth and slippery, and not uneven, or accumulated in ridges. *Adams v. Chicopee*, 147 Mass. 440; 18 N. E. Rep. 231; *Spellman v. Chicopee*, 131 Mass. 443; *Fitzgerald v. Woburn*, 109 Mass. 205; *Pinkham v. Topsfield*, 104 Mass. 78; *Stanton v. Springfield*, *supra*. This was held when the liability of cities and towns for

defective ways was more stringent than now. We think the same reasons which led to the adoption of the rule then hold good now, but that it should not be extended. The present case is, in some respects perhaps, a close one, but we cannot say that it should not have been submitted to the jury, or that the instructions were erroneous. The gutter extended clear across the sidewalk, and was about fourteen inches wide, and from one to one and a half inches deep, and formed a part of the sidewalk. It was competent for the jury to find that this constituted a defect in the way, and that its construction was such as to cause a special deposit of ice at that particular place. *Marvin v. City of New Bedford*, 158 Mass. 464; 33 N. E. Rep. 605, and cases cited; *Fitzgerald v. Woburn*, *supra*; *Spellman v. Chicopee*, *supra*. The case stands differently from what it would if the water, as it discharged from the conductor, spread out over the sidewalk in a thin sheet, and then froze. That would be like *Billings v. Worcester*, 102 Mass. 329, where it appeared that the sidewalk was properly constructed unless the slope was too great; and it did not appear what that was. This case resembles, more, *Fitzgerald v. Woburn*, *supra*. But there was evidence which would have justified the jury in going even further. The exceptions expressly state that there was "evidence on which the jury might have found that ice had accumulated to the height of a foot or more (it does not appear how much more) at the bottom of the iron conductor, and extending out in the stone gutter, about half way across the sidewalk," losing in thickness as it receded from the conductor, and extending easterly about six feet by the side of the grating, thus forming a mass of ice about six feet square, and partly within, and partly without, the limits of the way. There was also evidence on which the jury would have been justified in finding that the sidewalk had been in this condition for a number of days. We cannot say that a mass of ice such as the jury may have found existed was not, as matter of law, an obstruction to public travel, and did not render the way unsafe and defective. *Blake v. Lowell*, 143 Mass. 296; 9 N. E. Rep. 627; *Olson v. Worcester*, 142 Mass. 536; 8 N. E. Rep. 441; *Fitzgerald v. Woburn*, *supra*; *Adams v. Chicopee*, *supra*. The defendant contended, and there was evidence on which the jury could have so

found, that the ice was about an eighth of an inch thick, and extended from the stone gutter a little over six feet easterly, by the side of the grating, to a point opposite a window in the adjacent building, and was three feet or more wide at the east end, and a little narrower where it touched the gutter, and was perfectly smooth and even, and that the plaintiff slipped and fell on the thin ice furthest from the gutter. If this accurately described the condition of the ice and the place where the plaintiff slipped and fell, then she was not entitled to recover. But the plaintiff offered evidence that she slipped and fell as she stepped on the stone gutter with the ice in it, or into the gutter; and it was for the jury to say where the plaintiff slipped and fell. Their attention was plainly directed to this matter by the court. They were told that it was important for them to determine whether she slipped at the gutter as she stepped on it or into it, or near the window, where the grating was, the idea conveyed being, we think from the instructions, that if she slipped and fell on the smooth ice near the window she could not recover. The jury were also instructed, in substance, that if the water, as it came out of the conductor, accumulated in the stone gutter, and in consequence thereof caused a slippery condition at that particular place where it crossed the sidewalk, it was for them to say, taking into account all the circumstances of the case and the necessity of constructing buildings along the side of the way, whether the way was reasonably safe; and, if it was not, then it was out of repair and defective. We are of opinion that the attention of the jury was directed with sufficient explicitness to the essential features of the case, and that there was nothing in the rest of the instructions on this branch inconsistent with what was thus said.

The defendant contends, further, that the notice was defective because it did not describe the place where it was claimed, at the trial, that the plaintiff fell. The notice described the place as two feet east of the gutter. The defendant conceded that there was no intention to mislead. We should hesitate to say that a variance of two feet in describing the place of the accident would render the notice void. The object of the notice is to direct attention with substantial accuracy, not with unerring precision, to the place where the accident happened. In the present case, although the notice described the place where the plaintiff fell as

two feet east of the gutter, it went on to describe the cause of the injury as "an accumulation of ice, due, in part, to a water conductor, which was broken, and discharged water upon the sidewalk, and in part to a stone drain, which confined the water in such a way that it formed a defect in the sidewalk, and caused an accumulation of ice therein," thus directing attention especially to the stone drain or gutter. The jury has found that the defendant was not misled in fact by the notice, and we do not see how it could have been. The notice was not given till two weeks after the accident, but the examination, measurements and photographs on which the plaintiff relied were made and taken the morning after it, and included the gutter. All the witnesses testified to the condition of the gutter. We see no error in the instructions given on the matter of notice, and think that those requested by the defendant were rightly refused. If there was no intention on the part of the plaintiff to mislead, and if the defendant was not actually misled, it was immaterial if, through error, the plaintiff may have intended to describe, in fact, a different spot from the exact one where she fell. See *Gardner v. Weymouth*, 155 Mass. 595; 30 N. E. Rep. 363; *Fortin v. Easthampton*, 142 Mass. 486; 8 N. E. Rep. 328; *Canterbury v. Boston*, 141 Mass. 215; 4 N. E. Rep. 808; *Spellman v. Chicopee*, 131 Mass. 443. Exceptions overruled.*

Municipal corporations — liability for injuries resulting from snow or ice upon sidewalks and crossings.— The authorities on this question are collated in note to *Henkes v. City of Minneapolis*, 2 Am. R. R. & Corp. Rep. 211. See, also, 5 Am. R. R. & Corp. Rep. 51, note 4, and 7 Am. R. R. & Corp. Rep. 139, note 8. The following are recent decisions: A city is not liable for accidents occasioned by mere slipperiness caused by ice on a sidewalk, where the ice is not so rough or uneven or so rounded up or at such an incline as to make it an obstruction. *Calder v. City of Walla Walla*, 6 Wash. 377; 33 Pac. Rep. 1054. In an action against a city for injuries caused by falling on an icy sidewalk defendant may introduce in evidence an ordinance requiring the occupants or owners of property abutting on streets to keep the same clear from snow and ice, the purpose of such evidence being to show that it had provided for keeping the walks clear, and that it was entitled to wait a reasonable time for the persons specified in the ordinance to perform their duty. *Ibid.* Where, in an action against a city for personal injuries caused by slipping down on the ice on a highway, it appears that from natural causes, without fault upon the part of the city, the ice formed from the snow

* Reported in 36 N. E. Rep. 485.

which fell in the highway, the direction of a verdict for defendant was proper. *Kannenberg v. City of Alpena*, 96 Mich. 53; 55 N. W. Rep. 614. Failure of a city to remove ice from a depression at the crossing of two sidewalks, caused by a slight difference in the grades of the sidewalks, or to cover or place a guard around such ice to protect travelers, is not actionable negligence. *Chamberlain v. City of Oshkosh*, 84 Wis. 289; 54 N. W. Rep. 618.

WESTERN NATIONAL BANK OF NEW YORK v. ARMSTRONG.

(Supreme Court of the United States, March 12, 1894.)

1. NATIONAL BANKS. POWER OF VICE-PRESIDENT AND GENERAL EXECUTIVE OFFICER TO BORROW MONEY. The vice-president and general executive officer of a national bank has no power to borrow so large a sum as \$200,000 at four months' time for the bank in the absence of special authority from the board of directors, and persons dealing with him are presumed to know the extent of his powers in this regard.

2. RATIFICATION OF UNAUTHORIZED BORROWING. WHO MAY RATIFY AND WHAT AMOUNTS TO RATIFICATION. Ratification of the unauthorized act of a national bank officer in borrowing \$200,000 for the bank can only be made, if at all, by the board of directors, acting with knowledge of the material facts, and cannot be inferred from the mere fact that by direction of the same officer the money was placed to the credit of the bank, when it appears that it was drawn out by him and the assistant cashier, and that no part of it came to the use or benefit of the bank.

3. PRACTICE. PARTIES. SUBROGATION. A bill against the receiver of a national bank alleged a loan by complainant to the bank, at the request of its managing officer, secured by his pledge of certificates of stock of the bank, obtained by him as part of a proposed increase of its capital which had not been legitimated when the bank became insolvent, on account of which he had paid into the bank a certain sum of money, and prayed for subrogation to his rights on account of such money. Held, that the bill was demurrable for failing to make such officer a party, as, in his absence, his rights to recover the money could not be adjudicated.

4. MONEY PAID TO BANK FOR AN UNAUTHORIZED ISSUE OF STOCK NOT A PREFERRED CLAIM IN CASE OF INSOLVENCY. In the case stated in the last syllabus, the officer having procured the issue of stock to be prematurely made, would not have a preferred claim against the assets of the bank for the money paid in on the stock, but would be in the position of a general creditor only.

THIS was an action by the Western National Bank of New York against David Armstrong, as receiver of the Fidelity National Bank of Cincinnati, Ohio, to recover money alleged to have been loaned by the former bank to the latter. The bill was

dismissed by the court below, and from its decree the complainant appeals.

In December, 1888, the Western National Bank of New York, organized under the laws of the United States, and having its place of business in the city of New York, filed a bill of complaint in the Circuit Court of the United States for the southern district of Ohio against David Armstrong, as receiver of the Fidelity National Bank of Cincinnati, Ohio. The bill alleged that the Fidelity National Bank was indebted to the complainant bank in the sum of \$207,290, on account of a loan made on May 28, 1887, by the New York bank to the Ohio bank "at the special instance and request of E. L. Harper, who was then the vice-president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf." The bill further alleged that said loan was secured by collateral notes, signed by one A. P. Gahr, and indorsed by said E. L. Harper, and by the indorsement and delivery to the complainant by E. L. Harper of certificates for 1,600 shares of the capital stock of the said Fidelity National Bank; that said notes were, when they fell due, and still are, entirely worthless by reason of the insolvency of said Gahr and Harper; that said stock certificates did not and do not represent stock of the Fidelity National Bank, but were wholly invalid and void, because they did not constitute a part of the original and authorized stock of said bank, but were a part of a proposed increase of the capital stock of said bank, on account of which E. L. Harper had paid into the bank upwards of \$180,000, but which increase had never been voted for by the stockholders of said bank, nor had notice of said intended increase of said capital, with a certificate that the full amount of the same had been fully paid in, ever been sent to the comptroller of the currency of the United States, nor had the comptroller ever assented to such increase of capital, as required by law, but that, nevertheless, said Harper had procured from the president and cashier of said bank the certificates of stock so as aforesaid pledged with the complainant; that when said certificates were so issued to Harper the stock of the Fidelity National Bank had an established market value of \$153 per share, and that the complainant bank relied on said certificates as one of the securities for said

loan when it made the same ; that said moneys, so paid in by Harper on account of proposed stock, were held by said Fidelity National Bank on special deposit, and in trust for said Harper until such increase of stock should be duly authorized. The relief prayed for was that David Armstrong, receiver of the Fidelity National Bank, which had become insolvent, should allow the claim for said loan, and pay, out of the assets in his hands, dividends, the same as to other creditors of said bank, and that the complainant bank should be subrogated to the rights of Harper on account of the moneys so paid in for stock proposed to be issued, and which the complainant alleged to constitute a preferred claim.

Armstrong, receiver, entered an appearance and demurred to those portions of the bill in which were alleged the facts respecting the proposed issue of additional stock, and in which the complainant prayed to be subrogated to Harper's supposed rights in respect to the same. The alleged grounds of the demurrer were a want of necessary parties, in that the Fidelity National Bank and E. L. Harper were not made parties to said bill and for multifariousness.

Subsequently, in November, 1889, the court below sustained the demurrer to so much of said bill as was recited therein — being the said allegations seeking subrogations — and gave leave to answer the remainder of said bill.

An answer was duly filed, denying that the Fidelity Company was indebted to the complainant bank ; that the complainant had, on May 28, 1887, or at any time, loaned the Fidelity National Bank the sum of \$200,000, or any other sum, and alleging that the notes mentioned in the bill, made by A. P. Gahr and indorsed by E. L. Harper, were discounted by the complainant bank for said Harper, and that the proceeds of such discount were received by said Harper ; that the said notes were at no time the property of the Fidelity National Bank, and that the Fidelity National Bank never had any interest in said transaction and was in no way responsible therefor.

The cause was put at issue, evidence taken, and on April 8, 1890, a final decree was entered dismissing the bill at the cost of the complainant. The case comes to this court on appeal from said decree.

Edward Colston, Judson Harmon and George Hoadly, Jr., for appellant. *John W. Herron,* for appellee.

SHIRAS, J. (*after stating the facts*). Whether the transaction of May, 1887, was a discount by the Western National Bank of New York in favor of E. L. Harper of the four notes made by A. P. Gahr and indorsed by Harper, or was a loan by said bank to the Fidelity National Bank, is the question primarily discussed in the briefs and oral arguments of the respective parties.

In disposing of the case we are not assisted by any findings or opinion of the court below, and we are left to conjecture the grounds upon which that court proceeded in dismissing the bill of complaint.

The theory that the case was that of a simple discount by the New York bank of four promissory notes, made by Gahr and indorsed by Harper, and secured by the assignment by Harper of certificates of 1,600 shares of the stock of the Fidelity National Bank, comports with the form of the notes themselves. Such a transaction would have been an ordinary one, and in the course of the usual business of such a bank. The letter of May 16, 1887, in which the proposition was made to the New York bank to make the loan, was signed by E. L. Harper in his own name, without any official designation. That the \$200,000 were placed on the books of the New York bank to the credit of the Ohio bank was not inconsistent with this version of the case, because it appears that this was done at the request of Harper.

On the other hand, it is claimed that because the letter of May 16, 1887, was written on the letter paper of the Fidelity National Bank, and because the proceeds of the discount were placed to the credit of the Ohio bank, and were drawn out by drafts of that bank, the transaction was thereby shown to have been made on behalf of the Ohio bank; and C. N. Jordan, vice-president of the New York bank, testified that he understood the proposition to come from the Ohio bank for a loan to it, and that he would not have submitted the matter for approval to the board of the New York bank had he not so understood it.

There are other features of the correspondence that are pointed to by the parties as making for their respective contentions. It may be conceded that the New York bank acted upon the theory

that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral; but the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action, and having accepted and enjoyed the proceeds of the discount.

There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that "Harper was the vice-president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf." The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general bookkeeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice-president and managing officer, and that by "managing officer" he meant that Harper was the "general manager of the business of the bank." No such office as that of "general manager" is known or named in the National Bank Acts, nor does any such office exist by usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that as such he had power, without authority from the board, to bind the bank by borrowing \$200,000 at four months' time.

It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the 8th section of the National Bank Act (Rev. St. § 5136, par. 7): A national bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes."

The power to borrow money or to give notes is not expressly

given by the act. The business of the bank is to lend, not to borrow, money ; to discount the notes of other, not to get its own notes discounted. Still, as was said by this court, in the case of *First Nat. Bank v. National Exchange Bank*, 92 U. S. 127: "Authority is given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.

Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money ; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

Even, therefore, if it be contended that it was within the power of the board of directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money; and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place — that is, in the present case, the board of directors — and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity National Bank, by any act, formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction.

It is true that a corporation may become liable upon contracts

assumed to have been made in its behalf by an unauthorized agent by appropriating and retaining, with knowledge of the facts, the benefits of the contracts so made on its behalf; but there is no room for such a contention in the present case. The money advanced by the New York bank was, indeed, at Harper's request, placed to the credit of the Ohio bank, but it was shown that it was withdrawn partly by Hopkins, the assistant cashier, and partly by Harper himself, by drafts in the name of the bank, but that the moneys thus drawn never came into the actual possession or use of the bank. The moneys were appropriated by Harper to his own use, or, at all events, it does not appear that the bank ever got a penny of the borrowed money, or any benefit or advantage whatever, by reason of the transaction. The mere placing of the money in the name of the Ohio bank involved no ratification by the bank unless it was so placed with its knowledge and assent; nor did the withdrawal of the money by draft drawn by Harper or by his direction in the name of the bank constitute a receipt by the bank of such money, unless it was, in point of fact, received and used by the bank, or for its benefit. Not this, but the contrary, was shown.

So far, then, as the case of the plaintiff in error depends on the alleged loan of money to the Fidelity National Bank, we find no error in the decree of the court below in dismissing the bill.

This brings us to the consideration of the other phase of the case, namely, that which arose on the claim of the New York bank as the holder of the 1,600 shares of the stock of the Fidelity National Bank, transferred to it as security by Harper, to be subrogated to the supposed right of Harper to be repaid the moneys paid in by him on account of his subscription for an increase of stock, not voted for by the stockholders, and not approved by the comptroller of the currency.

The court below sustained the demurrer to this portion of the bill. Two grounds were asserted in the demurrer—one, the insufficiency of parties, in that neither the Fidelity National Bank nor Harper was made a party; the other, that of multifariousness. It is now contended before us that Harper was not a necessary party, because, as is averred in the bill and admitted by the demurrer, he had pledged and assigned his stock to the complainant bank, and it is argued that the bank thereby became

vested with whatever rights Harper had to have his money returned to him as a special deposit. It is also contended that asserting such a right of subrogation is so far within the equities of the bill, and so necessary an incident of the transaction, as to relieve the bill of the charge of being multifarious.

It is not easy to see why, if the complainant were really entitled to be subrogated to the rights of Harper in respect to the hypothecated stock, such a claim might not be set up in the same bill in which it seeks to be allowed, as a lender of money to the Fidelity National Bank, to participate in the payments made by the receiver.

But, however that may be, it seems to us that Harper, having procured an issue to himself of certificates of paid-up stock, was in no position, when the bank became insolvent, before the necessary steps to legitimate the increase of stock had been taken, to demand back his money, as if it were trust money, or constituted a preferred claim against the assets of the bank in the hands of the receiver. The utmost that he could claim would be to be treated as a general creditor, and entitled, as such, to participate in the payments made by the receiver.

In the case of *Armstrong v. Stannage*, 37 Fed. Rep. 508, which was the case of a suit by the receiver of the Fidelity National Bank to recover from a subscriber to the preferred increase of stock of that bank the amount of a promissory note given in payment of such subscription, it was held by Mr. Justice Jackson, then Circuit judge, that, as the necessary steps had not been taken to legitimate such increase of stock before the bank became insolvent, there was a failure of consideration, and the receiver could not enforce payment of the note. We, however, agree with the court below in thinking that such a question could not be raised in the present case, to which Harper was not a party. Harper had paid in the full amount of his subscription, and had procured the issue to himself of certificates for his stock, and has parted with the legal title to the stock by transferring the certificates to the New York bank. In such circumstances it might be claimed, with some appearance of justice, that Harper and his transferee were precluded from opening up the transaction and procuring a rescission of the subscription. If that were so, the holder of such stock, whether Harper or the New York bank, might have been

compelled to contribute to the payment of the indebtedness of the insolvent bank. *Bank v. Case*, 99 U. S. 628.

So, too, even if it were held that Harper was not precluded from surrendering his stock and recovering back the money paid on account of it, it might yet be made to appear that Harper, if he were answerable for the mismanagement which resulted in the bank's insolvency, could not, in a court of equity, and as against the creditors of the bank, recover back his subscription money. But it is plain that such questions as these could not be adjudicated in the absence of Harper as a party, and we, therefore, think the court below did not err in sustaining the demurrer for that reason.

Upon the whole, we are of opinion that the decree of the court below, in sustaining the demurrer, and in dismissing the bill, should be affirmed.*

NATIONAL BANKS—RECENT DECISIONS.

1. In general.—*Liability for false representations.*—A national bank is liable for fraudulent representations made by it through its cashier to another bank as to the financial responsibility of a customer. *Nevada Bank v. Portland Nat. Bank*, 59 Fed. Rep. 338.

Indebtedness in excess of limit—estoppel.—Revised Statutes, section 5202, providing that national banks shall not contract liabilities in excess of their paid-up capital stock, except upon notes of circulation, accounts for deposits, etc., does not intend that such items of liability shall be excluded in determining whether the indebtedness of a bank exceeds its paid-up capital stock at the time it incurs a liability as guarantor. *Weber v. Spokane Nat. Bank*, 50 Fed. Rep. 735. In an action against a national bank and its receiver on a promissory note, defendants may avail themselves of the defense that the note was executed in violation of Revised Statutes, section 5202, providing that national banks shall not contract liabilities in excess of their paid-up capital stock. The note being void as to the bank, it is not estopped to set up the defense in question. *Ibid.*

Jurisdiction of federal courts.—Act Congress, March 3, 1887 (24 St. 552), as corrected by act August 13, 1888 (25 St. 433), declares in section 4 that national banks shall, for the purposes of all actions and suits in equity by or against them, be deemed citizens of the states in which they are located, and that in such cases the federal courts "shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." Held, that the provision quoted does not, when one of the parties is a national bank, take away the jurisdiction inhering in the federal courts by reason of diverse citizenship, but is merely intended to preserve such jurisdiction in

*Reported in 152 U. S. 346; 14 Sup. Ct. Rep. 572.

cases in which both parties are citizens of the same state and a federal question is involved, or there are conflicting claims to land under grants of different states; thus placing national banks on precisely the same footing with individuals or other corporations, with respect to the right to sue or be sued in the federal courts. *Petri v. Commercial Nat. Bank*, 142 U. S. 644; 12 Sup. Ct. Rep. 325.

Converting state bank into national bank not a "closing of its business."—The conversion of a state bank into a national bank is not a "closing of its business" within the meaning of the New York statute of 1859 providing for the redemption of a state bank's circulation, and releasing it from liability on such notes as are not presented within six years after the giving of the prescribed notice; and any notes not so presented constitute a valid claim against the national bank. 26 N. E. Rep. 757, affirmed. *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520; 12 Sup. Ct. Rep. 60.

Power to receive special deposits.—The provision of the Revised Statutes of the United States, section 5228, that a national bank, after its failure, may deliver special deposits, is a legislative recognition of the power of national banks to receive special deposits. *First Nat. Bank v. Strang*, 137 Ill. 347; 27 N. E. Rep. 903.

2. Directors—personal liability for neglect or misconduct.—Directors will not be held personally liable for losses except in cases of active or passive fraud or extreme negligence. *Robinson v. Hall*, 59 Fed. Rep. 648. Directors have a discretion under the Revised Statutes, section 5136, whether or not to require bonds of their officers; and the omission to take a bond of a cashier who is a man of good repute and character, and of some visible property, does not of itself render them personally liable for losses caused by his misconduct. *Ibid.*

3. Usury—jurisdiction of state courts.—The fact that a state law declares that no corporation shall interpose the defense of usury does not prevent a corporation, when sued by a national bank for usurious interest, from setting up in defense that the transaction is illegal under the Revised Statutes of the United States, section 5197, which forbids national banks from charging interest in excess of the rate allowed by state laws. *Union National Bank v. Louisville, etc., R. Co.*, 145 Ill. 208; 34 N. E. Rep. 135. The courts of record of the state have jurisdiction in actions brought under sections 5197 and 5198 of the Revised Statutes of the United States to recover from national banks the penalty for knowingly taking, receiving, reserving or charging a greater rate of interest than is allowed by law. *Schuyler Nat. Bank v. Bolong*, 32 Neb. 70; 48 N. W. Rep. 826.

4. Officers—power to bind bank.—*Power of president.*—The president of a national bank has no power inherent in his office to bind the bank by the execution of a note in its name, but power to do so may be conferred upon him by the board of directors either expressly, by resolution to that effect, or by subsequent ratification, or by acquiescence in transactions of a similar nature, of which the directors have notice. *National Bank of Commerce v. Atkinson*, 55 Fed. Rep. 465. See, also, *Bell v. Hanover Nat. Bank*, 57 Fed. Rep. 821. The powers of presidents of corporations are considered in note to *Wait v. Nashua Armory Assn.*, 5 Am. R. R. & Corp. Rep. 149.

Power of vice-president.—In the case of *Chemical Nat. Bank v. Armstrong*, 50 Fed. Rep. 798; 59 Fed. Rep. 377 (C. C. A.), growing out of facts similar to those involved in the principal case, it was held that the same vice-president was authorized to borrow for and in the name of his bank \$300,000. The question, however, was not much considered, being passed over with a few words.

Power of cashier.—The cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft. *Flannagan v. California Nat. Bank*, 56 Fed. Rep. 959. A letter headed: "Portland Nat. Bank," and signed "Geo. W. Hazen, cashier," was held to be a writing signed by the bank within a criminal statute, in the case of *Nevada Bank v. Portland Nat. Bank*, 59 Fed. Rep. 338.

5. Loans and discounts.—Revised Statutes, section 5208, which makes it unlawful for any national bank to certify any check unless the drawer has on deposit money sufficient to meet the same, but declares that a check so certified shall be a valid obligation against the bank, does not, as between the parties, invalidate a pledge of bonds made by the drawer of such checks to secure the indebtedness thereby created from him to the bank, when the transaction has been completed by payment of the checks. *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240; 13 Sup. Ct. Rep. 66.

A loan made by a national bank to an association or person of a greater amount or proportion than is permitted by this section does not render the security taken for such loan void. *Portland Nat. Bank v. Scott*, 20 Oreg. 421; 26 Pac. Rep. 276.

Revised Statutes United States, section 5201, which forbids national banks to make loans on the security of shares of their own capital stock, does not invalidate such a loan, since only the government can take advantage of the breach of the law. *Walden Nat. Bank v. Birch*, 130 N. Y. 212; 29 N. E. Rep. 127.

6. Insolvency—liability of stockholders for assessments.—A corporation which holds certain shares of stock in a national bank as collateral security for a loan, and is carried on the registry of the bank as the holder of such stock "as pledgee," is not subject, on the bank's insolvency, to the statutory liability of a stockholder. *Pauley v. State Loan & Trust Co.*, 58 Fed. Rep. 666; 7 C. C. A. 422.

Married women, who are permitted by the laws of the state in which they reside to become shareholders in national banks, are liable to assessments thereon under the National Banking Laws. *In re First Nat. Bank*, 49 Fed. Rep. 120. The Code of North Carolina, section 1826, provides that no woman during coverture shall be capable of making any contract to affect her real and personal estate, without the written consent of her husband. Held, that a purchase of stock by a married woman is not a "contract" within the terms of the statute, and that the wife is liable upon an assessment although the stock was purchased without the written consent of her husband. *Robinson v. Turrentine*, 59 Fed. Rep. 554.

In an action by the receiver of a national bank to enforce an assessment under Revised Statutes, section 5151, against one credited on the transfer books

as a stockholder, it appeared that nearly a year before the failure he had sold his stock to a broker for an undisclosed principal; that he indorsed the same, and requested the broker to inform the cashier of the transaction, and to have the stock transferred; that the broker accordingly handed the stock to the cashier, gave him the necessary information, and requested him to make the transfer. This the cashier promised to do, but in fact the transfer was never made. The certificate recited that it was transferable on the books of the company "by indorsement hereon and surrender of this certificate." Held, that in requesting the cashier to make the transfer the broker acted as the seller's agent, and that the latter did all that was required of him as a prudent business man, and could not be held liable as a stockholder. *Whitney v. Butler*, 7 Sup. Ct. Rep. 61; 118 U. S. 655, followed. *Richmond v. Irons*, 7 Sup. Ct. Rep. 788; 127 U. S. 27, distinguished. *Young v. McKay*, 50 Fed. Rep. 394.

A federal court will not, even if it has the power under Revised Statutes, section 5234, grant an order authorizing a receiver of a national bank to compound the statutory liability of certain stockholders by accepting payment of a gross sum, less than is due, in satisfaction and discharge thereof, although more money would thus be realized than by proceedings to collect the same in the usual way, when it appears probable that such stockholders have fraudulently conveyed their property to avoid their legal obligations as stockholders, or to shield themselves from injury and exposure by litigation. In *re Stockholders of Cal. Nat. Bank*, 53 Fed. Rep. 38.

7. Insolvency — preferences.— Payment of a certificate of deposit by an insolvent national bank more than six weeks before its suspension, and at a time when it was in apparent good standing, and its insolvency known only by its cashier, who fraudulently concealed it, and when there was no evidence to show an intent on the part of the cashier to give preference to the depositor, is not void, under Revised Statutes United States, section 5242, providing that all payments by a national bank, made in contemplation of insolvency, with a view of preferring a creditor, are void. 17 N. Y. Supp. 404, affirmed. *Hayes v. Beardsley*, 136 N. Y. 299; 32 N. E. Rep. 855. The fact that the depositor is a director does not render him liable for the payment, where he acted in good faith, and was ignorant of any wrongdoing or of the bank's insolvency. *Ibid*.

8. Insolvency — set-off.— A promissory note was executed to a national bank in consideration of the amount being placed to the credit of the maker on the books of the bank. The maker thought, and had good reason for thinking, that the bank was solvent, but the managing officer of the bank knew it to be insolvent. Before the note matured, the charter was forfeited for insolvency and a receiver appointed. Held, that the undrawn balance should be allowed as an equitable set-off to the note, and such allowance is not a "preference" forbidden by the National Banking Law. 36 Fed. Rep. 63, reversed. *Scott v. Armstrong*, 146 U. S. 499; 13 Sup. Ct. Rep. 148. To the same effect are *Yardley v. Clothier*, 51 Fed. Rep. 506; 2 C. C. A. 349, and *Adams v. Spokane Drug Co.*, 57 Fed. Rep. 888.

9. Insolvency — proof of claims secured by collateral.— Creditors of an insolvent national bank cannot be required, in proving their claims, to allow

credit for any collections made after the date of the declared insolvency from collateral securities held by them. 50 Fed. Rep. 798, reversed. *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372 (C. C. A.). The following, among other cases, are cited in support of this doctrine: *People v. E. Remington & Sons*, 121 N. Y. 336; 24 N. E. Rep. 793; *In re Bates*, 118 Ill. 524; 9 N. E. Rep. 257; *Findlay v. Hosmer*, 2 Conn. 350; *Logan v. Anderson*, 18 B. Mon. 114; *Bank v. Patterson*, 78 Ky. 291; *Brown v. Bank*, 79 N. C. 244; *Kellogg v. Miller*, 22 Oreg. 406; 30 Pac. Rep. 299; *Miller's Estate*, 82 Penn. St. 113; *Graeff's Appeal*, 79 Penn. St. 146; *Patten's Appeal*, 45 Penn. St. 151; *Miller's Appeal*, 35 Penn. St. 481; *Allen v. Danielson*, 15 R. I. 480; 8 Atl. Rep. 705; *Bank v. Haug*, 82 Mich. 607; 47 N. W. Rep. 33; *West v. Bank*, 19 Vt. 403.

10. Taxation of shares by state.—*Assessment of stock to bank in solido.*—In *First Nat. Bank v. Fisher*, 45 Kans. 726; 26 Pac. Rep. 482, it is held that an assessment of the entire capital stock of a national bank "in solido" against the bank is invalid. The following cases are relied upon in support of this view: *Bank v. City of Richmond*, 39 Fed. Rep. 309; *Bank v. City of Richmond*, 42 Fed. Rep. 877; *Collins v. Chicago*, 4 Biss. 472; *Bank v. Britton*, 105 U. S. 322; *Van Allen v. Assessors*, 3 Wall. 596; *Bradley v. People*, 4 Wall. 459; *Bank v. Commonwealth*, 9 Wall. 353; *Ball on National Banks*, 215-224. To these may be added the case of *Miller v. Third Nat. Bank*, 46 Ohio St. 424; 21 N. E. Rep. 860. The contrary is held in *First Nat. Bank v. Chehalis County*, 6 Wash. 64; 32 Pac. Rep. 1051.

Meaning of the phrase "other moneyed capital" in United States statute.—Revised Statutes of the United States, section 5219, which prohibit the legislature of each state from taxing national bank stock at a greater rate than assessed upon the "moneyed capital" in the hands of individual citizens of the state, is intended merely to prevent moneyed capital invested in national banks from being placed at a disadvantage as compared with moneyed capital in the hands of citizens of the state, used for practically an identical purpose with that invested in the stock of national banks; and the non-taxation of credits owing to individual citizens, such as accounts, promissory notes and mortgages, is not an unlawful discrimination against national banks whose capital is taxed. *First Nat. Bank v. Chehalis County*, 6 Wash. 64; 32 Pac. Rep. 1051.

In *Mercantile Nat. Bank v. Shields*, 59 Fed. Rep. 952, the court holds the words mean money employed in a business whose object is to make profit by investing such money in securities by way of loan, discount or otherwise, which from time to time in the course of business are reduced again to money and reinvested; also, that shares of railroads, insurance companies and manufacturing corporations are not "moneyed capital" within the meaning of the statute. The proper construction of the words is elaborately considered in *Mercantile Bank v. New York*, 121 U. S. 138.

Assessment of shares — deductions allowed.—The individual stockholders of a national bank are allowed the same deductions from the assessment against them upon their shares of stock as other taxpayers in the state, owning moneyed capital, are allowed; but, of course, no double deduction or exemption can be allowed to any stockholder. *First Nat. Bank v. Fisher*, 45 Kans. 726; 26 Pac. Rep. 482.

Revised Statutes of Ohio, section 2730, allow a deduction of legal bona fide debts owing by citizens of the state to be made from credits held by them for purposes of taxation, but the state courts hold that such deduction is not allowable from shares in a national bank. Held, that this is a discrimination in favor of "other moneyed capital" of the state and against national banks. *Mercantile Nat. Bank v. Shields*, 59 Fed. Rep. 952. But where a similar statute contained a proviso that it should not apply "to any bank, company or corporation exercising banking powers or privileges," it was held that bona fide indebtedness could not be deducted from the value of national bank shares. *Bressler v. Wayne County*, 32 Neb. 834; 49 N. W. Rep. 787, overruling, upon rehearing, the original decision in the same case, reported in 25 Neb. 468; 41 N. W. Rep. 356. See, also, *Smalley v. City of Burlington*, 63 Vt. 443; 22 Atl. Rep. 611; *Puget Sound Nat. Bank v. King County*, 57 Fed. Rep. 443.

Assessment of shares—valuation.—For the purposes of taxation, bank shares of stock are worth what their market value is at the time the assessment is made, and not what their value may be on the consummation of a contemplated closing of the bank's business, and division made among the shareholders. *National Bank of Commerce v. New Bedford*, 155 Mass. 313; 29 N. E. Rep. 532.

Mandamus to compel officers of bank to exhibit list of shareholders.—State courts have jurisdiction to compel the officers of national banks by mandamus to exhibit to the county assessor the list of the shareholders in their banks, which list they are required by Revised Statutes United States, section 5210, to keep subject to the inspection of "the officers duly authorized to assess taxes under state authority," since, in respect to that duty, the bank officers are not officers of the United States. *Paul v. McGraw*, 3 Wash. 296; 28 Pac. Rep. 532. In order that county assessors may avail themselves of said act, it is not necessary that it should be supplemented by state legislation empowering the assessors to make demand for said lists. *Ibid.*

Collection of tax from insolvent bank—rights of creditors.—Public Statutes Massachusetts, chapter 13, sections 8-10, provide that shares of stock in all banks, state and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank itself, which, for reimbursement, shall have a lien on the shares and all the rights of the shareholders in the bank property. Held, that no suit for this tax can be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared; for, there being nothing from which the receiver can be reimbursed, the tax will fall upon the assets of the bank, which belong to its creditors, and thereby violate the rule that a state cannot tax the capital stock of a national bank. *City of Boston v. Beal*, 51 Fed. Rep. 306.

11. Criminal offenses under National Banking Act.—*Wrongful certification of check.*—An indictment under the act of July 12, 1882, chapter 290, section 13, amendatory of Revised Statutes, section 528, which makes it a misdemeanor for "any officer, clerk or agent of any national banking association" to "certify any check" drawn by a person who did not then have on deposit sufficient money to meet the same, need not allege delivery of the check by the bank after the certification. *United States v. Potter*, 56 Fed.

Rep. 83. The indictment, in charging in the language of section 5208, that the drawer of the check had not on deposit, at the time it was certified, "an amount of money equal to that specified" in the check is sufficient. Ibid. Other points, in regard to the sufficiency of the indictment, are passed upon in the same case.

Embezzlement by officers.—Embezzlement, abstraction and willful misapplication of the moneys, funds, etc., of a national bank, as described in Revised Statutes, section 5209, constitute three separate crimes or offenses, which, under Revised Statutes, section 1024, may be joined in one indictment, but must be stated in separate counts. United States v. Cadwallader, 59 Fed. Rep. 677. An indictment against the president of a national bank for misapplication of its funds alleged that he "unlawfully and willfully, and with intent to injure and defraud the said association for the use, benefit and advantage of himself, did misapply certain of the money and funds of said association, which he * * * then and there, with the intent aforesaid, paid and caused to be paid" to certain persons named. Held, that the indictment was bad for failure to allege the facts that made such payment unlawful or criminal. United States v. Eno, 56 Fed. Rep. 218. It is not essential that such indictment should allege that the acts charged were done without the knowledge and assent of the directors of the association, for such knowledge and assent would not relieve the president from liability for an unlawful or criminal misappropriation of the bank's funds. Ibid.

"False entries" by officers.—The offense of making false entries in the books of a national bank, for which an officer of the bank is liable to punishment under Revised Statutes, section 5209, since it is not a crime of which the state courts have concurrent jurisdiction under section 5328, is exclusively cognizable by the federal courts. Bank v. Dearing, 91 U. S. 29, followed. In re Eno, 54 Fed. Rep. 669. A "false entry" in a report by a national bank officer or director to the comptroller of the treasury, within the meaning of Revised Statutes, section 5209, is not merely an incorrect entry made through inadvertence, negligence or mistake, but is an entry known to the maker to be untrue and incorrect, and by him intentionally entered while so knowing its false and untrue character. United States v. Graves, 53 Fed. Rep. 634. It is not necessary, to complete the offense of making a "false entry" in a report to the comptroller of the treasury of the condition of a national bank, with intent to deceive or defraud, that any person shall have been in fact actually deceived or defrauded; for the making of such a "false entry" with the intent to deceive or defraud is sufficient. Ibid.

The sufficiency of indictments for making false entries is considered in the following cases: United States v. Potter, 56 Fed. Rep. 83; United States v. Potter, 56 Fed. Rep. 97; United States v. French, 57 Fed. Rep. 382.

VIRGINIA LAND CO. v. HAUPT.

• (Supreme Court of Appeals of Virginia, March 8, 1894.)

1. CORPORATIONS. REPUDIATING SUBSCRIPTION FOR FRAUD. One who was induced to subscribe for stock in a corporation formed to purchase and develop certain land, by statements made by one of its promoters, on whose supposed disinterested and superior judgment he relied, in ignorance that such promoter had an option on the land, is not liable on his subscription.

2. WAIVER OF FRAUD. LACHES. Laches does not begin to run as against a subscriber's right to repudiate a subscription obtained from him by fraud till he has knowledge of the fraud, or of facts which would reasonably arouse inquiry on his part.

3. EFFECT OF NOTICE TO PROXY. The subscriber is not affected with knowledge of the fraud by the disclosure of the facts in regard thereto at a stockholders' meeting for which the perpetrator of the fraud holds proxies from him, and at which he is not present.

Watts, Robertson & Robertson, for plaintiff in error. *Griffin & Glasgow*, for defendant in error.

LEWIS, P. The defendant in error was sued by the Virginia Land Company to recover certain unpaid assessments on the stock of the company aggregating \$2,800. The principal grounds of defense were (1) fraud in procuring the contract of subscription; and (2) a material variance between the prospectus and the charter of the company. The jury found for the defendant, and the court refused to disturb the verdict. The defendant subscribed for the stock at the instance of one O'Leary, who was a real estate agent at Roanoke, and one of the promoters of the company. It was proposed in the prospectus "to organize a company for the purchase of a certain tract of land, lying near the said city, containing about 550 acres, and to lay it out in residence lots, and to develop its natural attractions." By the charter subsequently obtained the company was authorized to buy land, not exceeding 5,000 acres, also personal property, and to issue mortgage bonds; to loan money to develop lands; to construct street railways, and to use cars impelled by any kind of motive power; to erect and operate motor, gas and electric works, etc. O'Leary was known to the defendant as a successful business man, and his name headed the subscription list. When he solicited the defendant to subscribe he informed him, in

answer to a specific inquiry, that the land proposed to be purchased belonged to Gates, Moorman & Moorman. In point of fact, O'Leary and one Christian, another subscriber to the stock and a promoter of the company, held options on the land, which fact was not mentioned to the defendant. O'Leary recommended the stock to the defendant as a desirable investment, and upon his advice the defendant agreed to take 100 shares. After the organization of the company the land was transferred to the company, and in consequence O'Leary and Christian realized a very large profit. The company was chartered early in March, 1890, and on the nineteenth of the same month the first stockholders' meeting was held, at which meeting O'Leary represented the defendant as his proxy. At the same meeting an assessment of ten per cent of the capital stock was ordered, notice of which was afterward sent to the defendant, and on the twenty-third of the ensuing August another assessment of five per cent was ordered. Upon receipt of notice of this last assessment the defendant wrote the secretary of the company as follows: "Dear Sir: I have your notice of September 1st, calling for an assessment of \$500,000 — five per cent on one hundred shares of your stock. If you will please refer to my letter of April the 28th, addressed to your treasurer, you will notice that I am not a stockholder in your company. Although I have never received a reply to this letter, I take it, in the absence of such acknowledgment, my stock was, as a matter of course, canceled. So that there may be no further misunderstanding in the matter, however, I beg to advise that I am not a stockholder in the Virginia Land Company, having paid no assessment whatever on the subscription." In the notice of the ten per cent assessment of March 19, 1890, it was said: "This amount must be paid promptly, or the stock will be declared forfeited;" and in response to this the defendant's letter of the twenty-eighth of April, above referred to, was written, which is as follows: "Dear Sir: I have your favor of the 24th inst., calling attention to ten per cent assessment of the Virginia Land Company's stock, and in reply beg to say that recent financial arrangements in another direction, that I am suddenly called upon to provide for, will make it impossible for me to pay this assessment now; and to prevent delays, as well as to avoid being a hindrance in any way to the

success of the company, I will be glad if you will consider my stock forfeited, as provided for in notice of assessment. * * * I will be glad, therefore, if you will dispose of my stock to other parties. I have been informed that the stock is selling at a premium, so I presume there will be no difficulty in doing this. Having paid nothing on the stock, I am, of course, not entitled to anything from it. At the trial the defendant testified that when he made the contract of subscription he had no other information respecting the proposed enterprise than such as he obtained from the prospectus and what was told him by O'Leary; that he was induced to subscribe by the urgent solicitation of O'Leary, in whose judgment and integrity he had confidence, and who earnestly recommended the scheme as a good investment. He also testified that he had no idea that O'Leary was interested in the land which it was proposed to buy otherwise than as a stockholder, and that, so far from the fact being disclosed to him, O'Leary, when questioned on the subject, represented that it belonged to Gates, Moorman & Moorman. He testified further that he would not have consented to subscribe had he known of the promoter's interest in the land, and that he had no intimation of any such thing as a "promoter's fund" until several weeks after he had subscribed.

The court, among other things, instructed the jury that if they believed from the evidence that O'Leary and Christian held options on the land, and that O'Leary induced the defendant to subscribe in ignorance of that fact, relying on his (O'Leary's) supposed disinterested and superior judgment, and that he, the defendant, was thereby misled, to his injury, into making a contract that he otherwise would not have made, then the subscription was voidable, at his option. This construction propounds the law correctly. The authorities are abundant in support of the general rule that one who is fraudulently induced by an agent of a corporation — and a promoter is an agent of the proposed corporation — to subscribe to its capital stock may, at his option, repudiate the contract; and that a fraud may consist as well in the suppression of what is true as in the representation of what is false. Indeed, the law is that, where the person solicited to subscribe has no other information on the subject than that the agent chooses to convey, the statement of the agent ought to be

characterized by the utmost candor and honesty. Cook Stock, Stockh. & Corp. Law (3d ed.), § 147; Crump v. Mining Co., 7 Gratt. 352; Boshier v. Land Co., 89 Va. 455; 16 S. E. Rep. 360; Directors, etc., v. Kisch, L. R. (2 H. L.) 99. It is contended, however, that the defendant has by his conduct waived the right to annul the contract in question. But there can be no waiver in a case of this sort without full knowledge of the facts, and such knowledge of the facts and such knowledge on the part of the defendant has not been shown. He says he had an intimation a few weeks after the organization of the company that there was a large promoters' fund, but as to who were the parties interested in the fund he was not informed. He made inquiry on the subject, he says, but could ascertain nothing definite; and that he relied on his letter of the twenty-eighth of April, in reply to the notice of the first assessment, to which he received no reply. And afterwards, when notified of the five per cent assessment, he promptly replied, calling attention to his said letter, and saying he was not a stockholder. He also called the attention of one of the directors of the company to the intimation he had had in regard to the promoters' fund, and informed him that he repudiated the contract. It is true, he gave a proxy to O'Leary to represent him at the first stockholders' meeting, at which meeting the facts in regard to the promoters' option on the land were disclosed; but, as was well said in the argument, it would be absurd to hold that he was affected by notice to O'Leary of what the latter knew from the beginning, and failed to disclose to him. And if he was not affected by notice to O'Leary, then there is no proof that he received any certain information of the facts constituting the fraud complained of before the institution of the present action. In treating of laches as a bar to the subscriber's remedies, Cook says: "The date from which laches begins to run is the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him. Mere suspicions or random statements, heard in public or in stockholders' meetings, do not necessarily constitute notice. But, after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once. The corporation has the burden of proof in asserting that the subscriber had notice and was guilty of laches." Cook Stock, Stockh. & Corp. Law

(3d ed.), § 162. Applying these principles to the present case, we are of opinion upon the ground of fraud the case is with the defendant, and that there has been no waiver of the fraud on his part; and, as this view is decisive of the case, it is needless to consider whether the case is within the ruling in *Manufacturing Co. v. Hockaday*, 89 Va. 557; 16 S. E. Rep. 877, on the ground of a variance between the prospectus and the charter of the company.

There were a number of exceptions taken to the rulings of the court during the progress of the trial, to review which seriatim would extend this opinion to a great length. It is enough to say in this connection that the case was submitted to the jury in substantial conformity with the views expressed in this opinion, and that the judgment must be affirmed.*

1. Action to rescind stock subscription for fraud — joinder.—Persons who have been induced by the same fraudulent representations, contained in a prospectus, to subscribe to the stock of a corporation, have a common interest and may join in a bill, for the benefit of themselves and others similarly deceived, to set aside their subscriptions. *Bosher v. Richmond & H. L. Co.*, 89 Va. 455; 16 S. E. Rep. 360. In *Wenstrom Consol. Dynamo & Motor Co. v. Parnell*, 75 Md. 113; 23 Atl. Rep. 134, which was a bill to rescind a subscription for stock, on account of fraud in procuring it, the evidence was held insufficient to sustain the bill.

2. Representations as to future acts and results not fraudulent.—To an action upon promissory notes given to a railway company as a subscription for stock therein, pleas to the effect that the company's agent who procured the subscription did so by representing that the road would be economically built, that the stock would be a good investment and would pay dividends, and by making other like representations, and that all these representations proved to be untrue, set forth no valid defense and were properly stricken out on demurrer. *Weston v. Columbus Southern R. Co.*, 90 Ga. 289; 15 S. E. Rep. 773.

* Reported in 19 S. E. Rep. 168.

YORK PARK BLDG. ASSN. v. BARNES.

(Supreme Court of Nebraska, March 21, 1894.)

1. CORPORATIONS. ACTION ON SUBSCRIPTION. WHETHER PURPOSE OF CORPORATION LAWFUL. A corporation which has for its object the purchase of land and the construction of houses thereon (the funds being realized from the capital stock paid in by subscribers in installments), and finally the allotment of the lots and houses among the stockholders in satisfaction of their stock, is one organized for the purpose of carrying on a lawful business, and authorized by the General Incorporation Laws.

2. WHETHER COMPLAINT MUST ALLEGE SUBSCRIPTION IN WRITING. In an action upon a subscription for stock, it is too late, after verdict and judgment, to object that the complaint does not allege that the contract of subscription was in writing.

3. ESTOPPEL TO DENY SUBSCRIPTION. One to whom stock in a corporation is issued, who pays assessments on such stock, acts as an officer of the corporation, and takes part in its management, is estopped to deny his subscription.

4. EFFECT OF AGREEMENT BY PROMOTERS THAT DEFENDANT NEED NOT PAY FOR HIS STOCK. An agreement made between promoters of a corporation and a subscriber to its stock, that such subscriber is to have the stock for the sake of the influence of his name, and that he will not be required to pay his subscription therefor, is void, and the corporation may enforce payment of such subscription notwithstanding such agreement.

ACTION by the York Park Building Association against J. W. Barnes to recover on a subscription for stock. Defendant had judgment, and plaintiff brings error.

Sedgwick & Power, for plaintiff in error. *George B. France*, for defendant in error.

IRVINE, C. This was an action by the plaintiff in error against the defendant in error to recover on a stock subscription. In instructing the jury the court, in the first place, stated at considerable length the issues raised by the pleadings, and submitted the pleadings to the jury with the instructions. The court next stated to the jury that the plaintiff, in order to recover, must establish the material allegations of the petition by a preponderance of evidence. Then an instruction was given as to what constituted a preponderance of evidence, and this was followed by the usual instruction submitting to the jury the credibility of witnesses and the weight to be attached to evidence. No other instructions were given. One of the assignments in the motion

for a new trial and the petition in error is that the court erred in not instructing the jury as to the law of the case. In *Manufacturing Co. v. Shiley*, 15 Neb. 109; 17 N. W. Rep. 267, it was said: "It is undoubtedly the duty of the judge presiding at a trial to instruct the jury upon the law of the case which is to be observed by them; and, should a case arise in which it shall appear from the record that the jury has taken a wrong view of the law applicable to the case, and where the judge has failed to instruct them, whether requested by the counsel or not, this court would not hesitate to grant a new trial." The same principle was substantially announced in *C. Aultman & Co. v. Martin*, 37 Neb. 826; 56 N. W. Rep. 622. An entire failure to instruct the jury in regard to the law of the case is very different from an omission to instruct in regard to some particular phase of the case, or some particular question arising upon the trial. In the latter case a proper instruction upon the subject must be requested before error can be predicated upon a failure to instruct; but the law imposes upon the court the duty of stating to the jury the law applicable to the case, and an entire failure to state the law to the jury has the effect of submitting to the jury the determination, not only of facts, but of the law. In this case there was a total failure to instruct the jury upon the law of the case. This would not be prejudicially erroneous if it were apparent that the jury had come to a correct conclusion (*Manufacturing Co. v. Shiley*, supra); but the error is prejudicial if it is apparent that the jury has taken a wrong view of the law. We must, therefore, examine the record, in order to determine that question.

The petition alleges the corporate existence of the plaintiff since August 6, 1887, and the articles of incorporation and by-laws are made a part of the petition. It then alleges that on the 3d day of August, 1887, the entire amount of capital stock was subscribed; that the defendant subscribed for one share thereof, and paid upon said share the sum of \$108.65. The petition then alleges that further payments to the amount of \$190 are due and unpaid, and that in addition thereto, the defendant is indebted upon his share for certain fines, interest and penalties. The answer is quite long. In effect, it denies the corporate existence of the plaintiff; denies the power

of the plaintiff to make assessments or impose fines. It alleges that, at the time of the pretended incorporation of the plaintiff, its officers and stockholders represented to the defendant that they would put one share of stock in his name for the sake of his influence, and that he should not at any time be required to pay therefor; that it was represented to him that street cars should be run through the property owned by plaintiff near defendant's residence, and that commodious and beautiful residences would be built near defendant's property; and that such promises had not been fulfilled. The defendant further alleged that he had acted as president of such pretended corporation for one year, and that his services in that behalf were worth \$1,000, for which he asks judgment. It was further averred that defendant had never at any time subscribed for stock of the plaintiff, but simply permitted, under the circumstances stated, stock to be placed in his name. It was also averred that sufficient stock was never subscribed to complete the organization of the plaintiff. The action was originally begun in the County Court, and the answer asserts that that court had no jurisdiction of the subject-matter. The plaintiff, in reply, in effect denies the allegations of new matter in the answer, and, in addition to that denial, avers that the defendant had acted as a stockholder in the corporation and acted as president thereof; had paid, for some time, his assessments and dues; and, as president, had executed evidences of indebtedness on behalf of the corporation, and generally held himself out as a stockholder. The reply further denies that, as president or other officer of the corporation, the defendant was entitled to any salary for his services. The defendant asserts that the petition does not state a cause of action. If this were so, of course the judgment in favor of the defendant would not be reversed; but we think a cause of action is stated. Upon this point the defendant urges illegality of the incorporation. There is good authority for holding that one who subscribes for stock in a corporation, acts as an officer thereof, and takes part in its management, cannot dispute the validity of the corporation. *Warehousing Co. v. Badger*, 67 N. Y. 294. But the question raised in argument upon this point does not relate to any irregularity in the proceedings, but is directed to the point that the corporation was not for a legal object. While the name adopted by the

corporation is one of the distinctive terms used in the act relating to building and loan associations (Sess. Laws 1891, chap. 14), and while the use of such a name is forbidden to corporations not complying with that act, that prohibition applies only to corporations organized after the adoption of the act of 1891. This corporation was organized in 1887. It is not a "building association" or "building and loan association," as those terms are used in the recent statutes. Its objects, as stated in its articles of incorporation, are to buy and sell real estate, to purchase or erect buildings, and to rent or sell the same, to sell its property, to borrow money, and to give mortgages to secure the payment thereof. A further inspection of the articles shows that the specific purpose was, in effect, a scheme of co-operation, whereby the stockholders, by obtaining the rights, and assuming the duties, of a corporation, obtained for that corporation a tract of land subdivided into lots, erected houses upon these lots, provided for the payment of the stock in monthly installments, and finally provided for the allotment of the lots and lands among the stockholders in discharge and satisfaction of the stock. The General Corporation Laws (Comp. St. chap. 16, § 123) permit any number of persons to become incorporated for the transaction of any lawful business. The business, as outlined by the articles of incorporation, is certainly lawful, and we cannot see any force to the argument that the formation of the corporation was not authorized by the law of the state.

It is next asserted that the petition does not allege any subscription in writing to the stock. By the more recent authorities, a subscription in writing is not necessary. *Cook Stock & S.* § 52. But, if a writing were required, it would be only because of the Statute of Frauds, and not upon any principle of the common law. In such a case it need not be pleaded that the agreement was in writing, at least when the question is raised after verdict and judgment. *Schmid v. Schmid*, 37 Neb. 629; 56 N. W. Rep. 207.

It is next asserted that the petition does not specifically allege that the entire capital stock had been subscribed. The petition does allege that on the 3d day of August, 1887, the entire amount of the capital stock required by the articles of organization was subscribed. This is a sufficient averment, at least unless the

objection be made by motion as to its certainty. Possibly, the denial of the jurisdiction of the County Court demands consideration. This contention seems to be based upon the proposition that the action relates to real estate. Upon this subject the law only denies to the County Court jurisdiction, in actions upon contracts for the sale of real estate, in matters wherein the title or boundaries of land may be disputed, and to order or decree the sale or partition of real estate. Comp. St. chap. 20, § 2. This case does not fall within any of these classes. The mere fact that the corporation had for its object transactions in real estate makes the subscription for its stock none the less personal in its character.

Subscription to the stock was denied. There was evidence tending to show that the original subscription book had been destroyed by fire, and it did not appear that the defendant ever had in his manual possession a certificate of stock; but it did appear that he authorized a share to be issued to him; that a certificate had actually been issued; that only stockholders were eligible to office; that he was, upon the organization of the company, elected its president, and served for a long time in that capacity; and that he had paid a number of installments upon a share of stock. This was sufficient to charge him as a subscriber, and he was estopped to deny his subscription. *Sanger v. Upton*, 91 U. S. 56.

There was considerable evidence upon the issue raised by the answer as to the agreement made by promoters of the corporation that the defendant should never be required to pay. Such an agreement is void. To permit its enforcement would operate as a fraud upon the other stockholders subscribing upon the faith of the defendant's subscription, as well as upon creditors of the corporation. The following cases, while not all precisely in point, firmly establish this principle: *Downie v. White*, 12 Wis. 195; *Bates v. Lewis*, 3 Ohio St. 459; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Warehousing Co. v. Badger*, 67 N. Y. 294; *Mann v. Cooke*, 20 Conn. 178; *Upton v. Tribilcock*, 91 U. S. 45; *Railroad Co. v. Bailey*, 24 Vt. 465.

All these issues were stated to the jury in form of an abstract of the pleadings, without stating any of the principles of law governing their determination. Some of them, as a matter of

law, should have been withdrawn from the jury; all of them involved questions of law which, under the charge, the jury was permitted to determine. Upon a review of the whole case we are satisfied, not only that the jury may have taken a wrong view of the law, but that in all probability it did so. Under these circumstances, the judgment is reversed, and the cause remanded. Reversed and remanded.*

1. Subscriptions to stock—subscribers not liable until all stock subscribed.—At common law a subscriber to the stock of a corporation is not liable on his subscription till the full capital stock is subscribed. *Denny Hotel Co. v. Schram*, 6 Wash. 134; 32 Pac. Rep. 1002. Under the statutes of Washington (1 Hill's Code, § 1497), providing that no corporation shall commence business until the whole amount of its capital stock has been subscribed, a subscriber is not liable on his subscription till the full capital stock is subscribed. *Ibid.* See, also, *Curry Hotel Co. v. Mullins*, 93 Mich. 318; 53 N. W. Rep. 360; *Hands v. Platte Valley Improvement Co.*, 35 Neb. 263; 53 N. W. Rep. 73; *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557; 16 S. E. Rep. 876. Though the stock is all apparently subscribed, yet if one of the subscriptions is invalid, the other subscribers are not liable. *Denny Hotel Co. v. Gilmore*, 6 Wash. 152; 32 Pac. Rep. 1004; *Denny Hotel Co. v. Schram*, 6 Wash. 134; 32 Pac. Rep. 1002. But see *Gibbons v. Ellis*, 83 Wis. 434; 53 N. W. Rep. 701.

2. Miscellaneous defenses to subscriptions.—It is no defense to an action on a subscription for stock that the corporation has not delivered or tendered the certificate of stock. *Columbia Electric Co. v. Dixon*, 46 Minn. 463; 49 N. W. Rep. 244.

One who subscribes to corporate stock for his wife, in the wife's name, is not liable on the subscription, because a married woman cannot make such a subscription, but if the subscription is for himself, although in the wife's name, it is otherwise. *Shields v. Casey*, 155 Penn. St. 253; 25 Atl. Rep. 619. What deviation in the line of a proposed railroad will discharge subscribers to the stock of the company. *Armstrong v. Korshner*, 47 Ohio St. 276; 24 N. E. Rep. 897.

3. Preliminary agreements to subscribe for stock.—A subscription for shares in a corporation thereafter to be formed under a general law may be accepted by the board of directors of the company after organization. *McCormick v. Great Bend Gas & Fuel Co.*, 48 Kans. 614; 29 Pac. Rep. 1147. Where parties sign a subscription list, but, upon taking corporate existence, adopt a slightly different name from the one first agreed upon, and a subscriber upon the original list signs and acknowledges the charter of the corporation, treats the original subscription as the subscription of stock to the company, and by his vote as a director thereof makes an assessment upon himself and other parties upon the original subscription list, and pays several of such assessments, such original subscription for shares must be regarded, as to him,

* Reported in 58 N. W. Rep. 440.

as having been accepted by the company after organization, and, as to him, the subscription was at least a valid proposition to the company which became irrevocable after such action, assessments and partial payments. *Ibid.*

Where a contract between the subscribers to the capital stock of a corporation to be formed and the parties contracting to erect a building for the use of the proposed corporation in carrying on its business is modified in the interest of the subscribers by the consent or acquiescence of the parties interested, and the contract, as modified, is performed in good faith, and the subscribers, acting collectively as a corporation, accept the property without objection from any source, defendant, one of the subscribers, is bound by this action, to which he made no objection until afterwards called on for his subscription. *Gibbons v. Ellis*, 83 Wis. 434; 53 N. W. Rep. 701.

Defendant signed a subscription for stock in plaintiff corporation, which was circulated with a prospectus stating that the corporation was to be located in R. The maximum capital was to be \$400,000, and the purpose was limited to "manufacturing locks, bolts and all house hardware, and other articles of a similar character." About two months later a second prospectus, under which the corporation was afterwards organized, was circulated for signatures, by which it appeared that the corporation was to be located outside of R.; that the capital stock was put at \$500,000, and the purposes of the corporation were made to embrace a large variety of industries and speculative enterprises. Defendant refused to sign this paper or in any way recognize it. Held, that he was not liable to the corporation for the stock subscribed for under the first prospectus. *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557; 16 S. E. Rep. 877.

HUDSON REAL ESTATE CO. v. TOWER ET AL.

(Supreme Judicial Court of Massachusetts, March 2, 1894.)

1. CORPORATIONS. RIGHT TO WITHDRAW SUBSCRIPTION. A subscriber to the stock of a proposed corporation may withdraw his subscription before the incorporation is completed, by giving due notice of such withdrawal.

2. The fact that the associates have incurred obligations on the strength of the subscription does not affect the right of withdrawal.

3. FACTS HELD SUFFICIENT TO SHOW A WITHDRAWAL. Defendants signed under seal for stock in a corporation. Afterwards articles of incorporation were executed and officers elected; but, before the incorporation was complete, defendants orally informed the president that if a certain change in the policy was made they would no longer be associates, and would not pay their subscriptions, which change occurred. Held, that the evidence was sufficient to show due notice and an effectual withdrawal of the subscription.

ACTION on contract by Hudson Real Estate Company against Herman C. Tower and others to recover the par value of

ten shares of capital stock in the plaintiff corporation subscribed for by defendants. Verdict for defendants. Plaintiff excepts.

J. T. & R. E. Joslin, for plaintiff. *James E. Cotter* and *John F. McDonald*, for defendants.

ALLEN, J. It was heretofore decided in this case that until the organization of the corporation the defendants' subscription was a mere proposition or offer which might be withdrawn, like any other unaccepted offer. 156 Mass. 82; 32 N. E. Rep. 465. The principal question which the plaintiff now seeks to present is whether, upon the evidence, and under the ruling of the court, the jury were warranted in finding a legal withdrawal or revocation of the subscription. The only withdrawal or revocation relied on occurred in an interview between one of the defendants and Henry Tower on August 31, 1889; and, in view of the verdict, the only question left is whether a notification of withdrawal given orally to Henry Tower was sufficient.

It will be necessary to state the situation of the parties. The contract declared on was a subscription under seal by the defendants for ten shares, of fifty dollars each, in the capital stock of a corporation to be organized under the laws of such state as a committee should determine, for the purpose of purchasing land and erecting a shoe shop thereon, to be rented to a certain firm for ten years on certain terms; said corporation to be organized as soon as may be, and, in advance thereof, an agreement in writing between a committee of the subscribers in behalf of all, with said firm, to be executed, binding the latter to take said plant for the period, and on the terms, stated, and, on the organization of the corporation, to be re-executed to bind both parties. The corporation was organized under the laws of Maine. The meeting for the organization was held at Portland, Me., August 29, 1889, at which time the articles of agreement, having been signed, were presented, by laws were adopted, and officers were chosen. The necessary papers were then prepared, as required by law, and were approved by the attorney-general of Maine September fifth, were recorded September sixth, and were received and filed in the office of the secretary of the state September 7, 1889. It was agreed at the argument that, under the laws of Maine, the

legal existence of the corporation as a corporation began on September seventh. On the thirty-first of August, Henry Tower's position was as follows: It must be assumed, though the bill of exceptions does not in express terms so state, that he was one of the subscribers. One of the plaintiff's requests for instructions assumes that there was a contract of the firm above referred to "with Henry Tower and others in behalf of the associates for the purchase of land and building a shoe shop thereon, dated August 19, 1889." This contract, being thus referred to by the plaintiff as an undisputed fact, must be taken to show that Henry Tower was acting as the person first named on the committee contemplated by the subscription paper to obtain an agreement in writing binding said firm to take a lease of the premises. On August twenty-ninth, at a meeting which apparently was the first formal step in the organization of the corporation, he was chosen president. By the statutes of Maine, which it was agreed we should refer to, the choice of officers is a necessary preliminary to the creation of the corporation. Rev. St. Me. chap. 48, §§ 17-19.

It is also obvious that on August thirty-first he was, in the opinion of the jury, acting as an officer in behalf of the associates, and not merely on account of his personal interest as one of the subscribers. Such is the fair result of the instructions, taken as a whole. The judge, in the course of his charge, called the jury's attention to this distinction by saying: "If Henry Tower was one of the officers of the associates for the purpose of managing their business, it would not be necessary that any other notice should be given than what was given to him; but if he went there simply as being interested, not acting as an officer, * * * it may be that he was not an officer, so that he would be a party authorized to receive any notice of withdrawal; and, if he was not, then it would be necessary for that fact to be communicated to the meeting." It being pointed out to the judge, at the close of the charge, that the plaintiff's records showed that, at the meeting on August twenty-ninth, Henry Tower was chosen president, he further instructed the jury that if he had been so chosen president, and the defendants notified him distinctly that, if a certain event should happen with reference to the change of the policy of the corporation as to mortgaging its

property, they would no longer be in the association, and would not pay a cent on their subscription, that would be a sufficient notification of their withdrawal if the event did happen. The undisputed testimony, so far as it is recited or disclosed in the bill of exceptions, goes to show that Henry Tower, in that interview, was acting in a representative capacity, and not merely on his own personal account. The plaintiff's requests for instructions raised no question on this point, but asked the court to rule that, "in order to constitute a valid withdrawal, the defendants must do some act, or make some unequivocal or unconditional statement, to the proper officer or officers of the associates, which shall amount to a public withdrawal from said contract." The instructions were given with reference to this request, and, as we understand them, they amounted to this: That Mr. Tower, having been chosen as president, and acting for the associates, was on August thirty-first a proper officer to be notified by the defendants of their withdrawal. We think this instruction was right. No instruction was asked at the trial that, in order to withdraw from the associates, notice must be given to all of them individually, or at a meeting of the associates. The plaintiff only contended that the notice must be given to the proper officer or officers. And it would plainly be impracticable to require a direct personal notice to them all. The right to withdraw would be nugatory if this were necessary. A subscriber who has a right to withdraw may not know, or have the means of knowing, who all of his associates are, or where they live. If he does know, they may be many in number, and widely scattered, or some of them may be away on a journey. No general meeting of them may be called which he can attend without leaving the state. He need not wait for a meeting before giving his notice of withdrawal. It was indeed held, in an early case in England, that all of the other subscribers must not only have notice, but must actually consent, before one of the subscribers could withdraw. *Canal Co. v. Raby*, 2 Price, 93. But now in England, as well as here, no such consent is necessary. If every one of the other subscribers should object, yet it is the right of a subscriber to withdraw before the corporation is formed. It is merely a question of giving due notice of his withdrawal. And in England it is not intimated in any modern case, so far as our examination has

gone, that notice must be given to all the other subscribers, or to a meeting of subscribers. The retraction has usually been made to the same persons to whom the application for shares was made. See *Lindl. Partn.* 99-105, and numerous cases cited. In this country no case has been cited, and we have found none, discussing the question what notice of withdrawal will be sufficient. In some cases no attempt to withdraw was made till after the corporation was formed. See, for examples, *Association v. Walker*, 83 Mich. 386; 47 N. W. Rep. 338; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248; 29 N. E. Rep. 1044; *Shoe Co. v. Hoit*, 56 N. H. 548; *Shober v. Association*, 68 Penn. St. 429. It is said in *Cartwright v. Dickinson*, 88 Tenn. 476; 12 S. W. Rep. 1030: "Before the organization of the corporation and acceptance of the subscription * * * the promoters might perhaps agree to release a subscriber by substituting other names for his." This goes on the idea that the subscriber has not an absolute right to withdraw, and that somebody's assent is necessary. In *Tavern Co. v. Burkhard*, 87 Mich. 182; 49 N. W. Rep. 562, the subscriber apparently made known his refusal to the persons who brought a second paper to be signed by him, and it was held to be sufficient; but the proper mode of giving such notice is not discussed, and the court incidentally remark that "the incorporators well knew, when the company was organized, * * * that the defendants expressly repudiated the whole arrangement." It is held that the death of a subscriber before the formation of the corporation is a revocation of a subscription. *Phipps v. Jones*, 20 Penn. St. 260; *Wallace v. Townsend*, 43 Ohio St. 537; 3 N. E. Rep. 601; *Pratt v. Trustees*, 93 Ill. 475; *Railway Co. v. Wilkerson*, 83 Mo. 235. Insanity is also held to be a revocation in *Beach v. Methodist Episcopal Church*, 96 Ill. 177. Death is a public fact, of which all the world must take notice, though the above decisions were not put on that ground (*Marlett v. Jackman*, 3 Allen, 287), but insanity is not. In most of the cases where the right of withdrawal of a subscription has been held to exist, there is nothing to show that all the other subscribers were notified, and there has been no question as to the sufficiency of the mode in which the withdrawal was made. See, in addition to the cases above cited, *Nut Works v. Shultz*, 143 Penn. St. 256; 22 Atl. Rep. 904; *Engine Co. v. Green*, 143 Penn. St.

269; 13 Atl. Rep. 747; Garrett v. Railroad Co., 78 Penn. St. 465; Railroad Co. v. Echternacht, 21 Penn. St. 220. An offer of reward made by public proclamation may be withdrawn in the same manner, and the fact that a claimant of the reward was ignorant of the withdrawal of the offer is immaterial. Shuey v. U. S., 92 U. S. 73. And, if not withdrawn by any express notice, a withdrawal is implied after the lapse of a considerable time. Loring v. Boston, 7 Metc. (Mass.) 409.

In the present case, it seems to us that Henry Tower was the proper person to whom a withdrawing subscriber should give notice of his withdrawal. So far as appears in the bill of exceptions, there was no other officer or person who so well or fully represented the subscribers at large. He was at the head of the principal committee, and, in addition to this, he had been selected and chosen as president, and he was acting in behalf of the subscribers. There is nothing to show that the chairman of the meetings had any duties except merely as presiding officer at the meetings. Taking the case as it stood, and in view of the requests for instructions, which implied that the notice of withdrawal would, of course, be given to some officer, and of the fact that nobody else was suggested as the proper officer or person to receive the notice, the ruling of the court was right that notice to him was sufficient; and the fact that the association did not come into legal existence as a fully formed corporation till a later date does not render the notice to him insufficient under the circumstances.

The plaintiff requested a ruling that the defendants could not withdraw after the associates had taken action on the strength of their subscription. This was rightly refused, as was held in the former decision. The plaintiff also asked an instruction that the defendants' offer was not conditional, and could not be made so by oral testimony. This instruction was given. The evidence to which the plaintiff objected was properly admitted for the purpose for which it was received, and the instructions to the jury carefully limited it to that purpose, and confined the attention of the jury to the single point of the defendants' withdrawal of their subscription. Exceptions overruled.*

* Reported in 36 N. E. Rep. 680.

Subscriptions for stock—right of subscriber to withdraw before incorporation completed.—The right of a subscriber to withdraw his subscription has been considered somewhat in notes on preliminary subscriptions to stock in 3 Am. R. R. & Corp. Rep. 737, 744, and 6 Am. R. R. & Corp. Rep. 14, 17, where the authorities on the point are cited. The right of withdrawal is maintained in *Greenbrier Industrial Exposition v. Rodes*, 7 Am. R. R. & Corp. Rep. 653, 655. Mr. Beach affirms the right of a subscriber to withdraw before the incorporation is completed, and cites numerous authorities. 1 Beach Priv. Corp. § 63.

HOOVER ET AL. V. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, July 19, 1893.)

1. **RAILROAD COMPANIES. DISCRIMINATION IN FREIGHT CHARGES.** The fact that a railroad company, pursuant to an agreement with a manufacturing concern, made previous to the latter's organization, which agreement was an inducement to its organization, charges it less per ton for the transportation from a certain point of coal to be used for manufacturing purposes than it charges a dealer in coal at the same place for like transportation, does not constitute an "undue or unreasonable discrimination," within the meaning of the act of June 4, 1883, prohibiting such discrimination, since the charges are not "for a like service from the same place, upon like conditions, and under similar circumstances."

2. **DIFFERENCES IN CIRCUMSTANCES AND CONDITIONS HELD TO JUSTIFY A DISCRIMINATION IN CHARGES.** The following differences in conditions and circumstances were found to exist, and were held to justify the discrimination complained of and to take the case from the prohibition of the act: (1) At the time the plaintiff commenced business the defendant company was under obligation by its contract to carry for the manufacturing company for the specified freight. (2) To obtain the reduced rate the manufacturing company were obliged to take twenty tons of coal daily, while plaintiffs were under no obligation to take any specified amount. (3) The manufacturing company was a consumer of coal and the plaintiffs dealers in coal merely, and there was no competition between them. (4) The business of the plaintiffs paid freight only on the coal received, while the business of the manufacturing company paid freight not only on the coal received, but also on its products and raw material, and otherwise added to the receipts of the defendant. (5) The lower rate to the manufacturing company did not prejudice the plaintiffs in their business, because the two were in no way in competition.

3. The fact that the manufacturing concern, without the knowledge of the railroad company, sold to its employees coal so carried for it is immaterial, in the absence of proof that any damages resulted therefrom to the coal dealer.

4. **LAWFUL DISCRIMINATIONS ARE NOT MADE UNLAWFUL BY SECRECY.** The discrimination complained of in this case being lawful and not within the act,

it is immaterial that plaintiffs were ignorant of it, or that defendants gave no notice thereof.

5. WHAT IS AN UNDUE DISCRIMINATION IS A QUESTION OF LAW. When the facts are ascertained or undisputed the question of the existence of an "undue or unreasonable discrimination," within the meaning of the act, is for the court.

6. DAMAGES IN CASE OF UNDUE DISCRIMINATION. Under act of June 4, 1883, making a railroad company liable to a person injured by unjust discrimination in charges "for damages treble the amount of injury suffered," the "injury suffered" must be proved, and it is not to be measured by the total amount of the discriminations complained of.

ACTION by A. M. Hoover and John C. Miller, trading as Hoover & Miller, against the Pennsylvania Railroad Company, to recover treble damages for unjust discriminations in freight charges, under act of June 4, 1883. From a judgment for plaintiffs, defendant appeals.

David W. Sellers and *W. & J. D. Dorris*, for appellant.
George B. Orlady, for appellees.

GREEN, J. The 3d section of the 17th article of the Constitution of 1874 is in the following words: "Sec. 3. All individuals, associations and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state, or coming from or going to any other state. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates." For the purpose of enforcing the foregoing provisions of the Constitution, the legislature enacted the law of the 4th of June, 1883. P. L. 72. The first and second sections are as follows: "SECTION 1. That any undue or unreasonable discrimination by any railroad company or other common carrier or any officer, superintendent, manager or agent thereof in charges for or in facilities for the transportation of freight within this state or coming from or going to any other state is hereby declared to be unlawful. Sec. 2. No railroad company or other common carrier engaged in the trans-

portation of property, shall charge, demand or receive from any person, company or corporation, for the transportation of property, or for any other service, a greater sum than it shall receive from any other person, company or corporation for a like service from the same place upon like conditions and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies or corporations alike, for such transportations and services, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company liable to the party injured for damages treble the amount of injury suffered." The action in the present case was brought to recover treble damages, under the second section of the act of 1883, for an alleged unjust and unreasonable discrimination against the plaintiffs in charges for freights on coal shipped from Snow Shoe to Bellefonte, within this state, over lines of railroad owned or controlled by the defendant company. The period of time covered by the claim of the plaintiffs was from September, 1889, to April, 1891, and it was alleged that the plaintiffs were overcharged twenty cents per ton on 10,607 tons carried over the defendant's road during the time named. Substantially the defense set up by the defendant was that in the year 1881 certain citizens of Bellefonte and vicinity, having in contemplation the erection of a manufacturing plant at Bellefonte for the manufacture of nails, waited upon the defendant company, through Gov. A. G. Curtin, who represented them, and endeavored to make, and did make, a special contract that if the plant was erected the company should not charge them more than thirty cents per ton for all coal shipped from Snow Shoe to the works at Bellefonte; that such contract was made, and the plant was then erected, and the manufacture of nails thereat was carried on from 1881 until and after the time covered by the plaintiffs' claim; that the plaintiffs were coal dealers only, who merely bought and sold coal, and returned no freight to the defendant as the product of any manufacturing operations; that they did not do any business as coal dealers, in

fact, did not come into existence, until the year 1889, eight years after the nail company was organized and commenced business, and while the defendant company was subject to, and bound by, the terms of their contract with the nail company; and that the plaintiffs were not discriminated against at all, because they were charged only the same freights as were charged to all others who were coal dealers only, and it was contended, as matter of law, by the defendant, that the discrimination in the rates of freight between the nail company and the plaintiffs was not, in view of all the circumstances of the case, an undue or unreasonable discrimination, within the meaning of the constitutional provision or of the act of 1883. In reply to points put to the court on the trial on this subject the learned judge who tried the cause charged the jury that the question of unjust discrimination was a question of fact to be determined by them, and he refused the defendant's point on that subject; but he did, nevertheless, also instruct the jury, as matter of law, that the distinction between a dealer and a manufacturer, set up by the defendant, was not a defense, and would not exempt the defendant from the penalties of the act of 1883. He said: "The defense claim, as an exemption from the penalty of this act, the fact that the one may be classed as a manufacturer, and the other simply as a dealer. I do not regard the law as making that classification. I think that the classification which the act of 1883 intended was a classification relating to the carriage, and not to the shipper himself. It may charge more for one kind of freight than for another. It may charge more for live freight than for wood, coal, iron or ore. It may charge more for a certain portion of its road than it does for others. These things are governed largely by the expense to which the common carrier is subjected. Common carriers may charge more when they ship but a small quantity than they do when they ship by wholesale. * * * But I do not think the law, or the policy of the law, permits them to classify the kind of dealer; that is, that they may make a discrimination between the character of the consignor or consignee ordinarily. * * * The evidence here is that each shipment was by carloads, during the same period of time, and under like circumstances. The fact that one party was a manufacturer and the other party were coal dealers we think is

not material in this case." The same idea was repeated, and a positive instruction was given that, upon the facts stated in the plaintiffs' point, "the service and conditions were alike, and the circumstances the same." We regard this as a binding instruction to the jury upon the law of the case, which left them no discretion but to find for the plaintiffs, the only question for them being the amount of damages to be found.

After a very patient examination of all the testimony and of all the authorities cited on both sides, we find ourselves unable to agree with the learned court below either as to their interpretation of the law or their judgment upon the facts. So far as the law of the case is concerned, there is no doubt that the act of 1883 does not prohibit all discrimination. It prohibits only discrimination which is undue or unreasonable, and the prohibited discrimination is further limited by the consideration that it must be "for a like service, from the same place, upon like conditions, and under similar circumstances." If, therefore, the discrimination in a given case is upon conditions which are not alike, and circumstances which are not similar, the act is inapplicable, and its penalties are not incurred. Nor can we regard this question as a question of fact for the jury alone. The ascertainment of the actual facts of the case, of course, is for them, but where these are established by undisputed testimony, or are presented by proper points which cover the facts in evidence, the resulting question is whether the facts established, or undisputed, or exhibited in properly drawn points, bring the case within the operation of the words or necessary meaning of the statute; and that, of course, is a question of law for the court, for the question then is one of interpretation. Do the words of the statute extend to and embrace the established facts of the case, or do they not? If they do not, the statute is not applicable, if they do, it is, and the court alone, as in all other similar cases, must determine that question. It is beyond the function of the jury.

Let us now recur to the well-established and the undisputed facts of the case, and inquire whether there are any, and if so, what, differences in the conditions and in the circumstances which attended the shipping of the coal to the plaintiffs and to the Bellefonte Iron and Nail Company, respectively. In the first place, we find the undisputed testimony of Gov. Curtin to the effect

that in 1881, and prior to the erection of the nail works, he called upon the defendant's officials, for the purpose of having them agree to carry the coal for the prospective works at thirty cents per ton. This testimony is clear, distinct, positive and entirely uncontradicted, and it was followed by proof that the contract was carried out by the defendant after some delay in the adjustment. Gov. Curtin said: "I went to Philadelphia for the purpose of having the arrangement made. I there saw Mr. Creighton, who was the freight agent of the Pennsylvania Railroad Company, and after some time in negotiating, he agreed that the freight should be reduced to thirty cents per ton where the amount consumed per day was twenty tons or more. He wrote me a letter, in which it was settled and fixed at thirty cents per ton." He then explained the loss of the letter, and his search for it, and said: "But of the contents of the letter I am perfectly clear in my recollection of it, and it was one of the inducements which contributed to the erection of the nail works in this place. There were other parties in this place engaged in other industries which would have had a right to the reduction, notably Valentine's works in operation, and the glass works, when they used the quantity indicated." As the court below charged directly against any effect being attached to the subject-matter of this testimony, the defendant is entitled to have it regarded as proof of an established fact; and, this being so, we have the following differences in the conditions and circumstances attending the shipments to the plaintiffs and the nail works, respectively: (1) The defendant, when it began carrying coal for the plaintiffs, in September, 1889, was bound by the terms of a contract made with the nail works eight years before, and during all the intervening time the plaintiffs were not even in existence as a firm, and were doing no coal business whatever. We know of no reason why that contract was not binding on the defendant, especially as Gov. Curtin testified, without contradiction, that all the other industries at Bellefonte were entitled to the benefit of it, if they took the requisite quantity of twenty tons daily. This being so, the defendant's hands were tied, and it could not charge the nail works fifty cents a ton if it had desired to do so. This constituted a most material difference in the conditions and circumstances of the shipments.

In an action by the nail works to recover the twenty cents a ton higher charge, if it had been made, to equalize it with the rate charged to the plaintiffs, it would have been no defense to say that a company of coal dealers had lately come into existence who were getting coal over the same road from the same point, and, therefore, the defendant would be obliged to charge fifty cents per ton thereafter. (2) The nail works were bound to take twenty tons every day, while the plaintiffs were under no such obligation. (3) The plaintiffs were dealers in coal merely, while the nail company was a manufacturer of fabrics, and itself consumed the coal it received. They were, therefore, not competitors in the same business, and a lower rate to the manufacturer would not, under the contract, affect the business of the plaintiffs injuriously. It is true there was proof that the nail company did sell some coal to their own workmen, but, as it is not shown that the defendant had any knowledge of this fact, they cannot be held responsible for it. (4) The business of the plaintiffs paid but one freight to the defendant, while the business of the nail company paid not only that freight, to wit, for hauling the coal to the nail works, but also, in addition to that, another, and entirely independent, freight, to the defendant on all the products manufactured by the nail company. This was a most important and vital difference in the conditions and circumstances of the two shipments. The authorities are very clear and strong that where an additional freight is obtained by means of the lower charge, the discrimination is justified, both at common law and under the statutes. The importance of this factor in the discussion is at once manifested by certain testimony given by the plaintiffs, through one of their witnesses, L. E. Munson, who was the superintendent of the Bellefonte Iron and Nail Company. On examination by counsel for the plaintiff he was asked: "Question. What did you say the capacity of the nail works was as to outgoing freight? Answer. About thirty tons a day; thirty or forty tons a day. Q. That would be three hundred kegs, would it? A. We have a capacity of five hundred kegs. Q. What was your outgoing freight? A. I suppose part of the time we made a hundred thousand kegs a year; from seventy-five to one hundred and twenty-five thousand kegs a year. Q. Would that mean about one car a day on a three-hundred keg basis? A. Yes, sir. Then we shipped con-

siderable muck bar. Q. Were you shipping muck bar at the time you were shipping nails? A. Sometimes; when we were making nails out of steel rods. Q. Were you making muck bar at the time you were making nails? A. Yes, sir. Q. Were you making bar iron and shipping it, at the time you were making nails? A. Yes, sir." As the foregoing testimony was given by the plaintiffs, and was not at all contradicted by the defendant, the plaintiffs are bound by it, and it must be taken as establishing the fact which it develops; and the fact thus established is of the greatest possible consequence in the case. It entirely destroys, in our opinion, the fundamental allegation of the plaintiffs that the shipments of coal to the plaintiffs and the nail works were made "upon like conditions and under similar circumstances," for the shipments of coal to the plaintiffs yielded but one freight to the defendant, while the shipments to the nail works yielded not only the same incoming freight on the coal of at least twenty tons a day, but an additional outgoing freight of thirty to forty tons a day of fabrics manufactured by the nail works. In view of this testimony, how can it possibly be said that the conditions of the two shipments are alike and their circumstances similar? That a railroad company may lawfully secure to itself so important an addition to its business by making a lower charge to one customer than to others is fully established by the authorities, as we shall presently see. (5) The manufacture and sale by the nail works of nails and muck bar were outside of, and entirely harmless to, the business of the plaintiffs, and hence a lower price for the coal consumed by the nail works was neither an undue nor an unreasonable discrimination against the plaintiffs, because it was an immaterial circumstance as affecting their business. This is self-evident. The plaintiffs did not deal in nails or muck bar, and the sale of those commodities by the nail company necessarily could have no effect upon the plaintiffs' business, which was the selling of coal to persons who consumed it. (6) As to all persons who did sell coal at Bellefonte, they were charged the same freights precisely as were charged to the plaintiffs. This is the undisputed testimony.

Let us now see what is the voice of the authorities upon the subject of discriminations in freight charges by carrying companies. The subject is an old one. Prior to any statutes in

England or in this country, the common law had pronounced upon the rights and duties of carriers and freighters, and in the enactment of statutes little more has been done than to embody in them the well-known principles of the common law. It happens, somewhat singularly, that the very question we are now considering, of a discrimination in the rates charged to coal dealers and to manufacturers who use coal as a fuel, does not appear to have arisen; and yet it is very certain that such discrimination does prevail, and has prevailed for a long time, on all lines of railway and canal. It is highly probable that the absence of litigation upon such discrimination is due to the general sentiment of its fairness and justness. Within the writer's knowledge, in the section of the state in which he lives, a much greater difference between the rates charged to dealers and those charged to manufacturers by the coal-carrying companies has always existed, and now exists, without any question as to its justness or its legality. It is matter of public history that along the valleys of the Lehigh and the Schuylkill there are great numbers of blast furnaces, rolling mills, rail mills, founderies, machine shops, and numerous other manufacturing establishments, which consume enormous quantities of the coal output of the state, and, at the same time, in every village, town and city which abound in these regions, an immensely large industry in the buying and selling of coal for domestic consumption is also prosecuted. And what is true of the eastern end of the state is without doubt equally true throughout the interior and western portions of the commonwealth, where similar conditions prevail. Yet from no part of our great state has ever yet arisen a litigation which called in question the legality or the wisdom or the strict justice of a discrimination favorable to the manufacturing industries as contrasted with the coal-selling industries. This fact can scarcely be accounted for, except upon the theory that such discrimination, as has thus far transpired, has not been felt to be undue or unreasonable, or contrary to legal warrant. In point of fact, it is perfectly well known and appreciated that the output of freights from the great manufacturing centers upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the

freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products, which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manufactured product, and is then distributed to the various markets where they are sold. In addition to this, a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of the business which has no existence in the business of carrying coal to those who are coal dealers only. Thus, a blast furnace requires great quantities of iron ore, limestone, coke, sand, machinery, lumber, fire bricks, and other materials, for the maintenance of its structures and the conduct of its business, none of which was necessary to a mere coal-selling business. These are some of the leading considerations which establish a radical difference in the conditions and the circumstances which are necessarily incident to the two kinds of business we are considering. Another important incident which distinguishes them is that the establishment of manufacturing industries and the conducting of their business necessitates the employment of numbers of workmen and other persons whose services are needed, and these, with their families, create settlements and new centers of population, resulting in villages, towns, boroughs and cities, according to the extent and variety of the industries established, and all these, in turn, furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal selling. In fact that business is one of the results of the manufacturing business, and is not a co-ordinate with it. The business of the coal dealer is promoted by the concentration of population which results from the establishment of manufacturing industries, and these two kinds of business are not competitive in their essential characteristics, but naturally proceed together, side by side, the coal selling increasing as the manufacturing increases in magnitude and extent.

These considerations are generic, and are suggested for the purpose of illustrating the differences between the fundamental conditions and circumstances of the two industries we are considering. Recurring now to the authorities, we find that the British statute of 17 and 18 Victoria, chapter 31 (1854), is perhaps the earliest instance of direct legislation upon this subject. That statute prohibited "undue or unreasonable preference or advantage" in transportation charges, but lacked the restricting words "from the same place, upon like conditions, and under similar circumstances," which appear in our act of 1883. Yet it was held in the cases of *Ransome*, 1 C. B. (N. S.) 437, and *Oxlade*, 1 C. B. (N. S.) 454, that it was competent for a railway company to enter upon a special agreement for the carriage of goods for a particular individual or company at a lower rate in respect of large quantities of goods and longer distances than for the one who sends them in small quantities and shorter distances. In *Ransome's* case it was said by Cresswell, J., in delivering the opinion of the court: "After a good deal of consideration we think that the fair interests of the railway ought to be taken into the account." In the case of *Nicholson v. Railway Co.*, 94 E. C. L. R. 366, the same doctrine was held, and it was also held that the second section of the Railway Traffic Act (17 & 18 Vict. chap. 31) was not contravened by a railway company carrying at a lower rate, in consideration of a guaranty of large quantities and full trainloads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. Crowder, J., said in the opinion: "When the statute speaks of 'undue and unreasonable preference or advantage,' and 'undue or unreasonable prejudice or disadvantage,' it uses language implying that there may be advantage to one person or one class of traffic and prejudice to another, which would not be within the act of parliament. The preference and prejudice must be 'undue' or 'unreasonable' to be within the statute, and although, in the case now before the court, it is quite manifest that the Raubon Coal Company have many and important advantages in carrying their coal on the Great Western railroad, as against the complainants

and other coal owners in the forest of Dean, still the question remains, are they 'undue' or 'unreasonable' advantages? This mainly depends upon the adequacy of the consideration given in return to the railway company for the advantages afforded to the Raubon Coal Company." The justice then proceeds to show that it was to the advantage and profit of the railway company to carry coals for the Raubon Company at a lower rate than for the complainants, and concludes, in the language of the syllabus above quoted, that this was no violation of the act. All of the foregoing cases recognize the proposition that if the interest of the railway company was subserved by charging the lower rate to the one company than to the other, the act was not violated. That conclusion was reached in a case where the complainant was in the same business with the favored company, and was injuriously affected by the discrimination, but the court held that this was permissible if the interests of the railway company were thereby subserved. With how much greater force can it be said that here, where there is no competition in the disposal of the coal of the plaintiffs and the products of the nail company, and also where the inducement to the defendant to make the lower rate for the nail company is a largely increased traffic on the defendant's road, neither the letter nor the spirit of our act of 1883 was violated.

The doctrine of the cases above cited was also declared in the case of *Baxendale v. Railroad Co.*, 94 E. C. L. R. 353, where Cockburn, J., said: "If an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, a court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantage were extended to all persons under the like circumstances." This latter incident would of course be essential where all of the favored class were in the same business. In the case of *Messenger v. Railroad Co.*, 37 N. J. Law, 531, cited for the appellee, the court was careful to say that "it must not be inferred that a common carrier, in adjusting his price, cannot regard the particular circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried,

its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference in that respect to some over others for carriage in the course of his business." In that case there was a very clear preference to one party over all others in the same business by the railroad company giving him a specific drawback upon freights on hogs carried from the same points, and, of course, as this was direct preference over all others, it was in violation of the law. But that decision has no application to this case. In the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263; 12 Sup. Ct. Rep. 844, it was held that the issue by a railway company engaged in interstate commerce of a party-rate ticket for the transportation of ten or more persons at a rate less than that charged to a single individual for a like transportation on the same trip did not make an unjust or unreasonable charge, nor an unjust discrimination, nor give an undue or unreasonable preference or advantage to the purchasers of the party-rate ticket, within the meaning of the several provisions of the Interstate Commerce Act of 1887. There was much discussion of the general subject of the prohibition of the general statute in the opinion of the Supreme Court of the United States in this case, from which it will be instructive to present some quotations. The English Traffic Act of 1854, above referred to, was fully considered, and the cases of *Oxlade* and *Ransome*, and others hereinbefore cited, were recognized and followed. Among other things, it was said by Mr. Justice Brown, who delivered the opinion: "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2, to make an unjust discrimination. Indeed, the possibility of just discrimination and reasonable preferences is recognized by these sections in declaring what shall be deemed unjust. * * * In order to constitute an unjust discrimination, under section 2, the carrier must charge or receive directly from one

person a greater or less compensation than from another, or must accomplish the same thing indirectly, by a special-rate rebate, or other device; but in either case it must be for a "like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible. In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. * * * In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge. * * * But, in so far as relates to the question of 'undue preference,' it may be presumed that congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald v. Hovey*, 110 U. S. 619; 4 Sup. Ct. Rep. 142." In the case of *Railroad Co. v. Gage*, 12 Gray, 393, the right to discriminate upon the basis of a carriage for a certain time, and in certain quantities, was declared. The claim of the shipper was for an equality of charges for shipments of ice with charges for shipments of bricks, because they were of the same class of freight; but the claim was not allowed. The court said, by way of illustration of the principle upon which there might be a lawful discrimination of rates upon the same class of goods: "If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time, or in certain quantities, for less com-

pensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without entitling all other persons and parties to the same advantage and relief." And this court said in the case of *Shipper v. Railroad Co.*, 47 Penn. St. 388: "We are not prepared to say that a railroad company may not discriminate in its rate of tolls in favor of domestic trade over foreign, in favor of home products over those which are extra-territorial; especially when the railroad lies wholly within the state. Ownership may not be a reasonable ground for a distinction, but weight, bulk, value, place of production, and many other things, may be."

These cases are cited as illustrations of various reasons and principles upon which lawful discriminations may be made even in charges for the carriage of the same goods over the same roads and to be used for the same purposes. But in the present case, where not only a particular quantity must be furnished to the railroad every day, but the goods at the point of delivery are to be used for totally different purposes, which do not conflict or compete with each other, the reason for a discrimination has an infinitely greater force. In *Hutchinson on Carriers* (p. 353), after a protracted review of all the cases (and they are very numerous), the writer sums up the result thus: "Mere inequality in charges does not, therefore, of itself amount to an unjust discrimination. It only becomes such when a discrimination is made in the rates charged for transportation of goods of the same class, of different shippers, under like circumstances and conditions. So a mere reduction from the established rate is not necessarily an unjust discrimination, but it becomes such when it is either intended, or has a natural tendency, to injure another shipper in his business, and destroy his trade by giving to the favored shipper a practical monopoly of the business."

We come now to consider the case of *Borda v. Railroad Co.*, 141 Penn. St. 484; 21 Atl. Rep. 665. It was an action of case brought against the Philadelphia and Reading Railroad Company by the plaintiffs, who were shippers of coal, to recover damages for alleged illegal discriminations in the freight charged to the plaintiffs on shipments of coal over the defendant's road, as against lower rates charged to other shippers over the same road. The case was by agreement of the parties referred to Mr. Peter

McCall as referee, who made a most exhaustive and elaborate report denying the claim of the plaintiffs, and his report was affirmed by this court. As the shipments had been made prior to the adoption of our Constitution of 1874, a preliminary question arose, whether it was the duty of the defendant to carry without discrimination. The referee held that such was the duty of the defendant, saying: "I regard it, then, as settled law in this state that a railroad company, a common carrier, owes a duty of equality to every citizen, and I adopt the position taken by Mr. Bullitt in argument that railroad companies have no right to make any undue discrimination or preference in their charges, and a charge made to one shipper higher than another, for the same service, under like circumstances, constitutes undue preference and discrimination, and, by consequence, renders the charge unreasonable. Such is the general rule, and it is vastly important to the general public that there be no undue relaxation of this rule, for, exercising, as they practically do, a monopoly of transportation on their roads, railway managers have in their hands a tremendous power, by discrimination, to enrich one man and ruin another. The equality, however, which is thus prescribed is not a strict and literal equality under all circumstances, however varying and different. It is rather an equality in the sense of freedom from unreasonable discrimination. It is only unjust, undue or unreasonable discrimination against which the law has set its canon. Arbitrary discrimination is illegal; is discrimination made with a view of giving advantage to one person. But the truism that circumstances alter cases applies here, and under a different state of circumstances a discrimination may be reasonable and lawful, which, were the circumstances the same, would be undue and unreasonable. In order to render lawful an inequality of charge, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises in each particular case." The writer regards the foregoing as the most precise and the most felicitous expression of the law upon the general subject under consideration that he has met with, and, therefore, quotes it entire.

The claim of the plaintiffs was to recover damages to the amount of upwards of \$60,000 for unjust discrimination in favor of Audenried & Co., rival coal shippers to the plaintiffs, by the

payment to Audenried & Co. of rebates on coal shipped from Port Richmond to points beyond New Brunswick at the rate of one dollar and sixty-five cents for steamer coal, and other rates for other grades. It was proved that these rebates were paid under agreements between Audenried & Co. and the defendant, made at the beginning of the season, and to continue throughout the season, and the referee was of opinion, and so found, that these contracts for continuous shipments during the whole season at fixed rates constituted such a difference in the conditions and circumstances of the shipments for Audenried & Co. and the plaintiffs, respectively, as to justify the discrimination, and prevent it from being illegal. In expressing his conclusions the referee says: "The defendant's case denies that the discrimination was willful, and made with any such design as imputed by the plaintiffs. It rests upon the ground that the payment of the drawbacks to Audenried & Co. was under an honest and bona fide belief that they were entitled to them, under an arrangement by which, in consideration of their having made contracts early in the spring for delivery of coal at fixed prices throughout the season, they were allowed the drawbacks in question. * * * On the whole, I am of opinion, upon the best consideration I have been able to give the subject, that the defendant did not pay to Audenried & Co. the drawbacks complained of in the first and additional count of the declaration willfully, and with intent to enable them to increase their business at the expense of the plaintiffs, but that it paid the same in good faith, under the belief that Audenreid & Co. had made contracts in the spring at a fixed price for the delivery of the coal. * * * I am of opinion, therefore, that the defendant could legally have allowed the drawbacks to Audenried & Co. which it did allow, if that firm had had contracts made in the early part of the season for delivery of coal in the eastern market at fixed prices. In that case, although the service rendered, to wit, the transportation, would have been the same as that rendered to the plaintiffs, yet the circumstances were different, and the difference of circumstances would have justified the discrimination."

While this court did not review the testimony taken before the referee, because it was not before us, we affirmed the judgment in favor of the defendant upon the report, conceding the facts to

be as found by the referee. It will be perceived, therefore, that in that case the circumstance that the coal was shipped for Audenried & Co., under contracts made at the beginning of the season, at fixed prices, and to continue throughout the season, was held a sufficient reply to a charge of unjust discrimination, although the commodity shipped was the same, to wit, anthracite coal, and the shipments were between the same points, to wit, from Port Richmond to points east of New Brunswick, and the plaintiffs were engaged in the same business as Audenried & Co., whereas here the plaintiffs were not engaged in the same business as the Bellefonte Nail Company. There could not be any competition between them in the products sold, and the rate at which coal was carried for the nail company was a matter of absolute indifference to the plaintiffs. We repeat again that we do not regard the sales of coal by the nail company to its own employees as of any moment in the case, (1) because there is no proof that they were made with the knowledge of the defendant, but there is positive and uncontradicted proof that they were made without such knowledge; (2) because the defendant is not responsible for such sales by the nail company; (3) because the coal carried by the defendant for the nail company was not carried for purposes of sale at retail, but for the purpose of manufacturing nails and muck bar; (4) because there is no proof that the plaintiffs sustained any damage by reason of the sales of the nail company to their employees. But it must be understood, and we so decide, "that a manufacturing company has no right to engage in the business of selling coal, even to its own employees; and if it does so, and the transporting company is notified of such selling, it must thereupon cease to carry coal to the manufacturing company at any less rate than it charges to the coal dealers, or incur the penalties of unjust discrimination.

The ruling of the court below would require that coal carried to blast furnaces, rolling mills, rail mills, founderies, and all other manufacturing enterprises, should be carried for the same price as the coal carried to any retail dealer in the same locality, though the quantity consumed by the former might extend to many thousands of tons each year, while the quantity carried for the latter might be a few hundred tons only, and although the manufacturing companies gave back to the carrier many thousands of

tons of freight each year, while the retail dealer gave back none, and although the business of the manufacturer in no wise competes with the business of the dealer. We think the differences in these respects between these two kinds of business are such as to justify a discrimination in the rates of freight charged to each, and the conditions of the two are not alike, and their circumstances are not similar, within the meaning of our act of 1883, and, therefore, there can be no recovery in this case. The fact that the payment of the rebates was not known to the plaintiffs is of no possible consequence, both because they had no right to know it, under our present ruling that the circumstances were not similar, and the conditions not alike, and also because, if the discriminating charge was lawful, the absence of notice to the plaintiffs would not make it unlawful. The same point was made and ruled in the Borda case. The referee said: "But in point of law I do not think that the duty of giving notice to the world of every special rate rests upon the carrier under penalty of being guilty of unlawful discrimination by his omission to give such notice. How and to whom is such notice to be given?"

It remains only to be added that differences of freight rates on coal to manufacturers and to mere dealers are, and have been for many years, in universal practice, and not a single case other than this has as yet reached the courts of last resort in England or in the United States, questioning the entire legality and propriety of such differences, and that circumstance is ample proof that both the professional and the lay mind have assented to the practice.

Speaking upon a similar subject — the difference in passenger rates upon ordinary tickets and thousand-mile tickets or go-and-return tickets — the Supreme Court of the United States in the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263 ; 12 Sup. Ct. Rep. 844, said: "In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their illegality has been questioned; that there is no such case in England, and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them."

On the question of damages, the court below charged the jury: "If the nail works paid twenty cents less freight per ton on their coal, they had that much of an advantage over others, and the law would seem, in the mind of the court, to fix that excess as the measure of the plaintiffs' damages." We think this was serious error. The act of 1883 contains no language justifying an instruction that the party injured can recover three times the amount of the difference in the rates charged. The words of the act are: "Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered." The "amount of injury suffered" is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be, but, in any event, it must be a subject of proof, and there was no proof in the case of the actual damage sustained. How does it follow that because the defendant company paid in 1889 to the nail company a rebate of some \$6,000 on all the shipments that had been made from 1881, and a few sums thereafter, the plaintiffs suffered damages to any extent? In point of fact the nail company paid the full freight of fifty cents a ton net during all these years, and their claim for rebates was not adjusted until 1889. How, then, does it appear that damage was suffered by the plaintiffs in consequence of the payment of the rebates to the nail company? It does not appear that the plaintiffs sold their coal for any less than the current market price at any time except when they and the other dealers were engaged in a war of prices, and sold it far below actual cost in a struggle to capture the market, and it does not appear but that the plaintiffs would have sold their coal at twenty cents less than they did if they had received the rebate. The natural inference is that that is precisely what they would have done in the contest for the market. But of all this there is not a word of testimony, and yet it is only actual damage that they can recover. The proof for the defendant was that they never cut the market price to their men, but maintained it even when the coal dealers of the town were slaughtering each other's trade by selling below cost. As three times the actual damage is the penalty the defendant would have to pay if the judgment were sustained, they have a

right to require very clear and definite proof as to what the actual damage was. When blast furnaces and great iron mills are built, they are not placed in cities or towns, but in the open country, where land is abundant and cheap, and of course on the line of a railroad. When they are established there is no population at the place of erection. The railroad companies are very willing to make as favorable terms as possible for freights on all the materials that are brought to the plants, and on all the products that are carried from them, because they get a largely increased business from such enterprises. When the works are erected, houses are built for the men and officials of the companies. After that come the usual accessories required to supply the wants of the population, to wit, merchants, tradesmen, mechanics, butchers, bakers, grocers, and, among others, coal dealers. But the moment the last of these arrive, if the principles which prevailed in the court below in this case are correct, the whole freight system agreed upon between the transporter and the manufacturer theretofore must be changed and advanced to the freight rates charged to the retail dealers, or else all the rates charged to such dealers must be lowered to conform to the rates charged to the manufacturer. If this is not done the railroad company incurs the risk of being visited years afterwards with claims for treble damages, which may embrace any period of six years, and, as all the dealers have the same right of action in this regard that any of them has, and every town or city along the line has some or many retail coal dealers and manufacturing establishments also within its limits, it is easy to see that the aggregate of such claims may soon absorb the entire property and assets of the strongest transporting companies of the state. We do not find anything in the law that renders necessary or possible any such results as these, and we think it wiser and better to administer the law so that the rights and interests of all may be conserved within rational and sensible limits.

We sustain the first, second, third and fifth assignments of error. The fourth and sixth assignments have no merit, and are not sustained. Judgment reversed.*

* Reported in 156 Penn. St. 220; 27 Atl. Rep. 282.

RAILROAD COMPANIES — SOME PHASES OF UNJUST DISCRIMINATION AND UNDUE PREFERENCE OR PREJUDICE UNDER THE COMMON LAW AND STATUTES.

N. B. In citing the decisions of the interstate commerce commission in this note, we have referred to both the Interstate Commerce Reports, published by the Lawyers' Co-operative Publishing Company, of Rochester, N. Y., and also to the official edition, or Interstate Commerce Commission Reports, the style of citation being respectively, "I. C. R." and "I. C. C. R."

1. Unjust discrimination at common law.—We have treated this subject at length in the note to *Union Pacific R. Co. v. Goodridge*, 8 Am. R. R. & Corp. Rep. 684, 700, arriving at the result that all unjust discrimination in charges, facilities or accommodations is forbidden by the common law.

2. Federal and state statutes.—The federal act to regulate commerce, commonly known as the "Interstate Commerce Act," was first passed in 1887, 24 U. S. Stat. 379; 1 I. C. R. 1. It was amended in 1889 in various sections (25 U. S. Stat. 855; 3d Ann. Rep. I. C. C. 409), and again in 1891 (26 U. S. Stat. 743; 5th Ann. Rep. I. C. C. 349). A further act was passed in regard to testimony in 1893. 27 U. S. Stat. 443. The portions of the act relating to discrimination remain as in the original act and are as follows:

"§ 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of persons or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"§ 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

"§ 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation for the transportation of passengers or of like kind of property, under substantially similar

circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the commission appointed under the provisions of this act such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

“§ 22. That nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable purposes, or to or from fairs or expositions for exhibition thereat, or the free carriage of destitute and homeless persons, charitable societies and the necessary agents employed in such transportation, or the issuance of mileage, excursion or commutation passenger tickets; nothing in this act shall be construed to prevent any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to the inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers or employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies; provided, that no pending litigation shall in any way be affected by this act.”

An interesting account of the evils which led to the passage of the Interstate Commerce Act will be found in the first annual report of the commission.

The provisions of the statutes of the various states on the subject of discrimination are collected and digested in 2 Stimson's Am. Stat. Law, §§ 8837, 8838, pp. 460-468. Constitutional provisions on the subject will be found in 1 Stimson's Am. Stat. Law, §§ 462-465. An extended abstract of State Constitutions and statutes will also be found in Appendix E, 4th Ann. Rep. I. C. C. pp. 243-285.

3. English statutes.—The first general act against discrimination by railroads is to be found in section 90 of the Railway Clauses Act of 1845 (8 & 9 Vict. chap. 20), entitled “An act for consolidating in one act certain provisions usually inserted in acts authorizing the making of railways.” The section is as follows:

“And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties; or for the purpose of collusively

and unfairly creating a monopoly, either in the hands of the company or of particular parties: It shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole, or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."

In 1 Hodges' Law of Railways, page 466, it is said: "The proviso of the 90th section of the Railway Clauses Act brought generally into force an enactment which had appeared in all special railway acts from a very early date."

The evolution of this section is described by Blackburn, J., in *Great Western Railway Co. v. Sutton, L. R.*, 4 Eng. & I. App. 226, as follows: "At first the legislature in each special act inserted such clauses as seemed, to the particular committees, reasonable in each case. Very soon these came to be usual clauses which the then chairman of committees of the House of Lords used to require to be inserted in all railway bills with more or less modification. They were known by his name, as 'Lord Shaftesbury's clauses.' Finally, in 1845, the legislature embodied in a general act (8 & 9 Vict. chap. 20) those clauses which it was thought expedient should generally be inserted in railway acts." Pp. 237, 238.

One or two examples of the special provisions may be referred to. The charter of the London and Southwestern Railway Company, passed in 1834, gave the company power to raise and lower the tolls to be charged within certain limits prescribed by the act, with a proviso "that the said company shall not partially raise or lower the rates, tolls or sums payable under this act, but all such rates, tolls and sums shall be so fixed as that the same shall be taken from all persons alike, under the same or similar circumstances." 4 & 5 Wm. IV. chap. 88, § 154, quoted in *Baxendale v. London & S. W. R. Co., L. R.*, 1 Exch. 137, 138.

By a special act, applicable to the Birmingham and Derby Junction Railway Company, passed in 1839, it is provided that the charges "authorized to be made for the carriage of any passengers, goods or other matters or things to be conveyed by the company, shall be at all times charged equally, and at the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, and under the same circumstances; and no reduction or advance in any charge for conveyance by the company, or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the same portion of the railway only, and under the same circumstances as aforesaid." See *Attorney-General v. Birmingham & D. J. R. Co.*, 2 Eng. R. & C. Cas. 124.

Other examples will be found as follows: Charter of London & B. R. Co., 3 & 4 Will. IV, chap. 36, § 181, 1833; Charter of London & N. W. R. Co., 3 Will. IV, chap. 36, §§ 177, 181, 1832, quoted in *Crouch v. London & N. W. R. Co.*, 2 Carr. & Ker. 798; Charter of Eastern Counties Ry. Co., 6 & 7 Will. IV, chap. 106, § 186, 1836, quoted in *Baxendale v. Eastern Counties R. Co.*, 4 C. B. (N. S.) 63, 66; 9 E. C. L. R. 61, 65; Charter of Grand Junction R. Co., 3 Vict. chap. 49, § 26, 1839, quoted in *Pickford v. Grand Junction R. Co.*, 3 Eng. R. & C. Cas. 193, 210, 211; Charter of Great Western R. Co., 7 & 8 Vict. chap. 3, § 50, 1844, quoted in *Baxendale v. Great Western Ry. Co.*, 14 C. B. (N. S.) 1, 2; 108 E. C. L. R. 2.

The next general act aimed at discrimination is the Railway and Canal Traffic Act of 1854 (17 & 18 Vict. chap. 31), section 2 of which is as follows:

"Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to, or worked by, such companies respectively, and for the return of carriages, trucks, boats and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to, or in favor of, any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal, communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodations may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf." The act will be found in 1 I. C. R. 844, and in Appendix A of second annual report of the commission.

The principal acts subsequently passed for the regulation of railways are the following: Regulation of Railways Act, 1868, 31 & 32 Vict. chap. 119; 1 I. C. R. 846; Regulation of Railways Act, 1871, 2 I. C. R., Appendix I, p. 8; Regulation of Railways Act, 1873, 36 & 37 Vict. chap. 48; 1 I. C. R. 846; Regulation of Railways Act, 1888, 51 & 52 Vict. chap. 25; 2 I. C. R., Appendix I, p. 9. An abstract of all these acts will be found in Appendix A of the second annual report of the commission.

An abstract of railroad regulations in foreign countries will be found in Appendix G of the fourth annual report of the commission.

4. These statutes are declaratory of the common law.—These statutes, so far as they prohibit unjust discrimination, or the giving of any undue or unreasonable preference or advantage, are generally held, in this country, to

be declaratory of the common law. *Bayles v. Kansas Pac. R. Co.*, 13 Col. 181; *Kansas Pac. R. Co. v. Bayles*, (Col.) 35 Pac. Rep. 744; *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453; *McNees v. Missouri Pac. R. Co.*, 22 Mo. App. 224; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407; *Atwater v. Delaware, L. & W. R. Co.*, 48 N. J. L. 55; *Atlantic Express Co. v. Wilmington & W. R. Co.*, 111 N. C. 463; 16 S. E. Rep. 393; *Sandford v. Railroad Co.*, 24 Penn. St. 378; *Ragan v. Aiken*, 9 Lea, 609; *Atchison & C. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667; *Riddle v. New York, L. E. & W. R. Co.*, 1 I. C. R. 787; 1 I. C. C. R. 594; 1 Wood Ry. 639, note 3.

5. Discrimination between individuals by serving some and refusing others.—It has been the settled law for more than 200 years that common carriers cannot discriminate between different members of the public by serving some and refusing to serve others, where there is no just reason for the refusal. *Wheeler v. Railroad Co.*, 31 Cal. 46, 55; *Tarbell v. Cent. Pac., etc., R. Co.*, 34 Cal. 616; *Turner v. North Beach, etc., R. Co.*, 34 Cal. 594; *Pleasants v. North Beach, etc., R. Co.*, 34 Cal. 586; *Indianapolis, etc., R. Co. v. Renard*, 46 Ind. 293; *Lake Erie & W. R. Co. v. Acres*, 108 Ind. 548; *Sayre v. Louisville Union Brewing Assn.*, 1 Duvall, 146; *New England Express Co. v. Maine Cent. R. Co.*, 57 Maine, 188; *Day v. Owen*, 5 Mich. 520; *Union Locomotive Express Co. v. Erie Ry. Co.*, 37 N. J. L. 23; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407; *Atwater v. Delaware, L. & W. R. Co.*, 48 N. J. L. 55; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Sandford v. Railroad Co.*, 24 Penn. St. 378; 2 Phila. 107; *West Chester & Phila. R. Co. v. Miles*, 55 Penn. St. 209; *Twells v. Pennsylvania R. Co.*, (Penn. Sup. Ct.) 3 Am. Law Reg. (N. S.) 728; *Avinger v. South Carolina R. Co.*, 29 S. C. 295; *Hannibal R. Co. v. Swift*, 12 Wall. 262; *Heck v. East Tenn., etc., R. Co.*, 1 I. C. R. 775; 1 I. C. C. R. 495; *Riddle v. New York, etc., R. Co.*, 1 I. C. R. 787; 1 I. C. C. R. 594; *Jackson v. Rogers*, 2 Shower, 327; 2 Wood on Railroads, § 297; *Hutch. Carr.* § 297; 2 Am. & Eng. Ency. of Law, p. 793. The carrier may refuse to receive as a passenger one who would endanger the safety or welfare of other passengers, or one who is unable, by reason of mental or physical weakness, to take proper care of himself. This would apply to persons affected with a contagious disease or intoxicated, and to pickpockets and gamblers who sought passage only for the purpose of plying their vocations while in transit. 2 Wood R. R. § 297. But if one is in other respects a fit and proper person to be transported, the carrier cannot exclude him because of race, color, religious belief, political affiliations, prejudice, or any reason purely personal to the individual. *West Chester & Phila. R. Co. v. Miles*, 55 Penn. St. 209, and the cases above cited. So the carrier may refuse goods which are not properly packed or which are not offered at a proper time or place or for some similar reason. But otherwise he may not reject the goods of one person, while receiving like goods from others. *Hutch. Carr.* § 296; 2 Wood R. R. § 297.

6. Discrimination in the order of forwarding goods.—It is a general rule that carriers must forward goods in the order in which they are received, and this is conceded by all the authorities. *Hutch. Carr.* § 327; *Great Western R. Co. v. Burns*, 60 Ill. 284; *H. & T. C. R. Co. v. Smith*, 63 Tex. 822; *State ex rel., etc., v. C., N. O. & T. P. Co.*, 2 Am. R. R. & Corp. Rep. 106. But

where there is an accumulation of goods, and some must be delayed, a preference may be given to perishable goods. *Tierney v. New York Central, etc., R. Co.*, 76 N. Y. 305; *Marshall v. New York Central, etc., R. Co.*, 45 Barb. 502; S. C., 48 N. Y. 660; *Swetland v. Boston & A. R. Co.*, 102 Mass. 276; *Peet v. C. & N. W. R. Co.*, 20 Wis. 594. In the latter case the court says: "The rule there is, that the common carrier is to deliver the goods in a reasonable time. If the carrier received for transportation goods perishable and those not so at the same time, and there was a rush of freight, so that he could not transport and deliver all before the perishable goods would perish, but could deliver the perishable in time to save them, if the delivery of the others was delayed, can there be any doubt what his duty would be? Can there be any doubt that a preference in such case would be reasonable, and if reasonable, that the perishable goods, if they did not have the preference, would not be delivered in a reasonable time, and the carrier would be liable? If not, there is no invariable rule that freight of all kinds shall be transported and delivered in the order in which it is received. If the custom of giving such preference has been long established and is well known, the parties are supposed silently to adopt the custom as part of the contract, unless it conflicts with its express terms. *Cooper v. Kane*, 19 Wend. 386; 6 T. R. 14; 6 T. R. 398. We doubt, however, whether the proof showed this custom had been so long established as to make it a part of the contract. But we think the practice reasonable and not in violation of any rule of law."

So, in *Michigan Central R. Co. v. Burrows*, 33 Mich. 6, it was held that preference might be given to goods for the relief of sufferers by the great Chicago fire, and any similar emergency would doubtless justify a similar preference.

7. Discrimination in receiving or delivering freight.—Where a railroad company makes a rule, closing its station for the receipt of goods at a specified hour, but receives its own vans and those of its agents after that hour, it is an undue preference of itself or agents, and an undue prejudice of those engaged in collecting and forwarding goods or otherwise desiring to deliver goods for shipment after such hour. *Garton v. Bristol & Exeter R. Co.*, 6 C. B. (N. S.) 639; 95 E. C. L. R. 639; *Garton v. Bristol & Exeter R. Co.*, 1 B. & S. 112; 101 E. C. L. R. 112; *Baxendale v. London & S. W. R. Co.*, 12 C. B. (N. S.) 758; 104 E. C. L. R. 758; *Palmer v. London, etc., Ry. Co.*, L. R., 6 C. P. 194; *Camblus v. Philadelphia & R. R. Co.*, 9 Phila. 411. But see *Palmer v. London & S. W. Ry. Co.*, L. R., 1 C. P. 588. Where a railroad company allowed a certain person to hold himself out as the agent of the company for receiving parcels for transportation, so that a delivery to such person was, as to third persons, equivalent to a delivery to the company, and goods so received were accepted without condition, but it required plaintiff and others to subscribe to various conditions, limiting its liability, it was held that there was an undue preference of the company's agent, and the discrimination was enjoined. *Baxendale v. Bristol & Exeter Ry. Co.*, 11 C. B. (N. S.) 787; 103 E. C. L. R. 787.

So, in the matter of the delivery of goods, it is held that the carrier is "bound to afford equal facilities and advantages to all, whether the quantity of goods carried be large or small." *Cooper v. London & S. W. R. Co.*, 4 C. B.

(N. S.) 738; 93 E. C. L. R. 738. In this case the defendant unloaded goods consigned to Pickford & Co., who were carriers of parcels, into their vans or wagons, but refused to do this for others. It was held to be an undue preference, and that plaintiff, who was also a carrier, was entitled to the same facilities afforded Pickford & Co. The delivery to some without prepayment of freight and the refusal to so deliver to plaintiff, was held to be an unjust discrimination in *Phelps v. Texas & P. R. Co.*, 4 I. C. R. 363. So, where a railroad company refused to switch cars of coal to the plaintiff, upon his paying or tendering the freight and switching charges, unless he would also agree in advance to pay any demurrage charges which might be made against him, thus requiring him to agree to pay such charges, irrespective of whether they were just or not, it was held to be an unjust discrimination against the plaintiff. *Macloon v. Chicago & N. W. R. Co.*, 3 I. C. R. 711; 5 I. C. C. R. 84.

The refusal to deliver parcels to the plaintiffs, who were carriers, on general orders from their customers, but requiring a special order in each case, which was impracticable, was held an undue prejudice in *Parkinson v. Great Western Ry. Co.*, L. R., 6 C. P. 554. So, when the company disregarded the address or direction of goods in care of the plaintiffs, or per the plaintiffs, and delivered the same to the ultimate consignors through its own agents, whereby the plaintiffs were deprived of the profit and other advantages of such delivery. *Hood & Co. v. London & S. W. R. Co.*, 7 R. & C. Traffic Cas. 111.

A railroad company may not discriminate between different grain elevators of the same place, either by contracting to deliver exclusively to certain favored elevators, or by charging a discriminating tariff, when all are connected by side tracks and are equally accessible. *Vincent v. Chicago & Alton R. Co.*, 49 Ill. 33; *People v. Chicago & Alton R. Co.*, 55 Ill. 111; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365; *Chicago & Alton R. Co. v. People*, 67 Ill. 11, 19. The same is held with respect to different stock yards. *Keith v. Kentucky Central R. Co.*, 1 I. C. R. 601; 1 I. C. C. R. 189.

Affording free cartage to or from its stations to some and denying it to others is an undue preference. *Thompson v. London & N. W. R. Co.*, 2 Nev. & Mac. 115; *Stone v. Detroit, etc., R. Co.*, 3 I. C. R. 60; 3 I. C. C. R. 613; *Interstate Com. Com. v. Detroit, etc., R. Co.*, 57 Fed. Rep. 1005; *Evershed v. London & N. W. R. R. Co.*, 2 Q. B. D. 254; S. C., L. R., 3 H. L. App. Cas. 1029. A railroad company having its terminal at East St. Louis charged the same rate on flour, whether shipped from St. Louis or East St. Louis, and it bore the expense of the transfer from the former to the latter place. This was held to be an unjust discrimination in favor of the St. Louis shippers. *Hezel Milling Co. v. St. Louis, etc., R. Co.*, 3 I. C. R. 701; 5 I. C. C. R. 557. Where some shippers have side tracks connecting with their premises, and do their own hauling and unloading of cars, and the company is thus saved the expense of hauling, unloading and station room, it may make a fair rebate to such parties; but if such rebate is more than the expense saved, it will amount to an undue preference. *Bell v. London & N. W. R. Co.*, 2 Nev. & Mac. 185. In *Lees v. Lancashire & T. R. Co.*, 1 Nev. & Mac. 352, it appeared that the defendant had a station at Oldham road, in Manchester, for goods of all kinds; that owing to

the increase of its business it established a new station a mile distant for coal and minerals. The plaintiff had a coal yard with side track near the old station. The city of Manchester had gas works near the old station with a side track, and the defendant continued to deliver coal to the city upon its side track after the establishment of the new station, but refused to do so for the plaintiff, though he was similarly situated and had the same facilities for delivery. It appeared that the city received about two-thirds of the coal shipped to Manchester; that it did not sell coal; that all dealers were treated alike, and that the delivery on the side tracks of the city was a benefit to the public of the city. It was held that the discrimination was not unreasonable.

See, also, *Robertson v. Midland, etc., R. Co.*, 2 Nev. & Mac. 409; *Thomas v. North Staffordshire R. Co.*, 3 Nev. & Mac. 1; *Locke v. North Eastern Ry. Co.*, 8 Nev. & Mac. 44; *Hall v. London, B. & S. C. Ry. Co.*, L. R., 15 Q. B. D. 505; *Watkinson v. Wrexham, etc., R. Co.*, 3 Nev. & Mac. 5.

8. Discrimination between hackmen, draymen and others, engaged in carrying goods and passengers to and from stations.—This subject has already been treated in the note to *McConnell v. Pedigo*, 5 Am. R. R. & Corp. Rep. 711. Since then no decisions have appeared except that of *New York Central, etc., R. R. Co. v. Flynn*, 26 N. Y. S. 859. The facts of the case do not fully appear, but it may be inferred that the railroad company had made some arrangement with the Consolidated Transfer Company, by which the latter was given the exclusive privilege of standing hacks and of soliciting passengers upon its depot grounds. The suit was to enjoin the defendants from violating this exclusive privilege. The injunction was granted at Special Term and the order affirmed at General Term. A statute of New York provided as follows: "No preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad corporation to any one of two or more persons, associations or corporations competing in the same business, or in the business of transporting property for themselves or others." Laws 1890, chap. 565, § 34. It was held that the question turned entirely upon the construction of this statute. The court says: "It is clear that defendants have no right upon plaintiff's premises unless such a right is conferred by the above-quoted statutory provision. * * * The meaning of the statutory provision under consideration is, as above suggested, not entirely clear; but we think it should be construed to mean that no preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings, or upon its grounds, shall be given by railroad corporations to any one of two or more persons competing in the same business, or in the business of transporting property, while having contractual relations with said railroad corporation as a common carrier." See, also, 2 Wood R. R. 1177; *Hutch. Carr.* § 523.

An ordinance of the city of Colorado Springs provided that hotel runners, stage and omnibus drivers, hackmen and expressmen plying their respective vocations at any passenger depot of any railroad in such city, on the arrival and departure of trains, should occupy no part of the depot grounds or premises except that portion allotted and designated to them by the station agent of such depot. Held, such ordinance is not to be construed as giving a railroad company the right to exclude from its depot grounds or premises any

person lawfully engaged in serving the traveling public, either with or without vehicles, nor to confer upon such company the power to grant exclusive rights and privileges to persons engaged in such occupations; but such ordinance, being authorized by statute, is to be upheld as a reasonable regulation to promote the convenience of the traveling public, and to prevent disorder at railway stations. *City of Colorado Springs v. Smith*, (Col.) 86 Pac. Rep. 540.

9. Discrimination in facilities or accommodations afforded shippers or passengers at stations. — Granting side tracks to some and refusing the same to others, under similar circumstances, is an undue preference. *Beeston Brewery Co. v. Midland Ry. Co.*, 5 Ry. & Canal Traffic Cas. 53; *Girardot v. Midland Ry. Co.*, 5 Ry. & Canal Traffic Cas. 60. Where plaintiff had a side track to his coal mine from the defendant road, and afterwards connected his mine with another road, it was held not to justify the defendant in discontinuing the side track, and it was ordered to restore the same. *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274. When a railroad company permits one grain dealer to erect an elevator on its right of way, it must grant the same privilege to all others who desire, in good faith, to do so. *State ex rel. v. Missouri Pacific R. Co.*, (Neb.) 3 Am. R. R. & Corp. Rep. 82.

In *West v. London & N. W. Ry. Co.*, L. R., 5 C. P. 622, it appeared that the defendant had land adjoining its station, and that it let the whole of it to P., a coal merchant, for storing coal. P. did not use the whole, and W., a coal merchant at the same place, applied for the part not used by P. or for other equal facilities. Being refused, he applied for a rule to compel the defendant to afford him facilities for the storage of coal equal to those afforded P. *Boville, C. J.*, and *Keating, J.*, held that there was an undue preference of P. within the act of 1854, and that the defendant should be restrained from granting greater facilities to P. than to M. On the other hand, *M. Smith and Brett, JJ.*, held that the act only applied to the receiving, forwarding and delivery of traffic, and that the complaint had reference to the storing of coal after delivery, which was not within the act. As the court was equally divided the rule failed. In *Audenried v. Philadelphia & Reading R. Co.*, 68 Penn. St. 370, the defendant operated a railroad from the coal regions to the Delaware river. It had a wharf on the river where coal was dumped to await shipment by boat. Space was allowed to different shippers, and the defendant carried, dumped and stored the coal and charged accordingly. Plaintiff, who had been accommodated for some time, was denied privileges at the wharf, and sued to obtain such privilege. The case is not clear, but the court seems to hold that the wharf did not stand on the same footing as the railroad, and that the defendant could not be compelled to give equal facilities in its use and enjoyment. *Lancashire & Yorkshire Ry. Co. v. Gillow*, L. R., 7 Eng. & I. App. 517, tends to support similar views. But see *Oxlade v. Northeastern Ry. Co.*, 1 C. B. (N. S.) 454; 87 E. C. L. R. 454. In *East & West India Dock Co. v. Shaw, Saville & Albion Co.*, L. R., 39 Ch. D. 524, it appeared that the dock company had two docks twenty miles apart. It had a railroad connected with one so that the dock formed part of the railroad within the acts of parliament. It was held, however, that this did not bring the

other dock within the act, and that the railroad commissioners had no jurisdiction to restrain the company from charging preferential rates as to this dock. In speaking of *West v. London, etc., Ry. Co.*, L. R., 5 C. P. 622, above referred to, it is said: "What did it matter whether it was the storage of coal in a place near the station or fifty miles off on some superfluous land which the company might somewhere or other have got, and which they were letting for the purpose of storage. The principle is one and the same."

The accommodations afforded passengers at stations must be the same or equal for all. Separate waiting rooms may be provided for the white and colored races, but they should be equal in quality, comfort and accommodations. *Smith v. Chamberlain*, (S. C.) 17 S. E. Rep. 371; 7 Am. R. R. & Corp. Rep. 393.

See, also, on the subject of this section the authorities cited in sections 6 and 7 of this note, and the case of *Foreman v. Great Eastern Ry. Co.*, 2 Nev. & Mac. 202.

10. Discrimination in the quality of the service rendered.—It is manifest that there might be unjust discrimination in various ways in the quality or character of the service rendered for a specified charge. But complaints in this direction have been confined mostly or wholly to the treatment of colored passengers, whereby they have been compelled to accept inferior accommodations to white people on the same train, though paying the same compensation. This has been repeatedly held to be an unjust discrimination. *Council v. Western & A. R. Co.*, 1 I. C. R. 638; 1 I. C. C. R. 339; *Heard v. Georgia R. Co.*, 1 I. C. R. 719; 1 I. C. C. R. 428; *Heard v. Georgia R. Co.*, 2 I. C. R. 508; 3 I. C. C. R. 111; *Louisville, etc., R. Co. v. Mississippi*, 1 Am. R. R. & Corp. Rep. 724; *Ex parte Plessy*, 7 Am. R. R. & Corp. Rep. 383, and note. It is legitimate to provide separate cars or accommodations for the two races, but they must be equal. *Ibid.*

11. Distinctions based upon quantity — less than carloads, carloads and trainloads.—The practice of charging a less rate for shipments in carload lots than for shipments in less than carloads has long prevailed, and is very general, and has uniformly been approved. *Scofield v. Lake Shore & M. S. R. Co.*, 2 I. C. R. 67; 2 I. C. C. R. 90; *Thurber v. New York Central & H. R. R. Co.*, 2 I. C. R. 742; 3 I. C. C. R. 473; *Harvard Co. v. Pennsylvania Co.*, 3 I. C. R. 257; 4 I. C. C. R. 212; *Brownell v. Columbus, etc., R. R. Co.*, 4 I. C. R. 285; 5 I. C. C. R. 638; *Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.*, 4 I. C. R. 373; *Railroad Commissioners v. Symns Grocer Co.*, post. The reasons for the rule are thus stated by the interstate commerce commission in the case first cited: "The cost of service is very considerably less in case of shipments in carload lots than in less than carload quantities. * * * The shipment by the carload goes direct to destination. It is loaded by the shipper, and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the way bill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than carload quantities. There is but one collection of charges for freight. * * * Where the shipment is in less than carload quantities a separate receipt or bill of lading has to be given to every shipper

for his parcel. A separate entry of every item has to be made on the way bill. The shipment is by a local freight train, which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually two or three times as long as in the case of a carload shipment, according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation." The propriety of giving less rates upon carload quantities is questioned by Commissioner Knapp in *Brownell v. Columbus & C. M. R. Co.*, 4 I. C. R. 285, 292, 294; 5 I. C. C. R. 638. He says: "If the system of lower rates for carload quantities had not been in vogue when government regulation was first undertaken, if the general practice prior to that time had been to charge in all cases by the hundred pounds, I apprehend that permission to establish a carload rate, on the ground that the railroads could afford to grant it, would have been unhesitatingly denied."

While a discrimination in favor of carload shipments is sanctioned by the courts and justified by the difference in the cost of service, it is not an unjust discrimination against the larger shipper for a carrier to charge one uniform rate per 100 pounds for all shipments regardless of quantity. *Brownell v. Columbus & C. M. R. Co.*, 4 I. C. R. 285; 5 I. C. C. R. 638. In this case the complaint was that eggs in carload lots were charged the same rate as in less quantities, and the plaintiff sought an order compelling the defendant to make a less rate for carloads. The defendant adopted this practice as to other commodities. The application was denied. The same principle is affirmed in *Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.*, 4 I. C. R. 373, where it was held that the giving of carload rates upon single commodities did not necessitate the giving of such rates upon mixed carloads, made up of similar commodities, such as grain products.

The difference between the rates for carloads and less than carloads must be no more than is reasonable. As the distinction is based wholly upon the difference in the cost of service, it would seem clear that the difference in rate should in no case exceed such difference in cost. If it did it would manifestly be unreasonable and, therefore, an unjust discrimination in favor of the larger shipper. Whether the difference in rates may equal the difference in cost of service is a different question. Such cost of service is not the only element to be considered in fixing rates; it would seem to follow that difference in the cost of service is not the only element to be considered in fixing the difference in rates for carloads and less than carloads. "A reasonable amount of difference is difficult to adjust, but it should not be prohibitory upon the business nor unjustly disproportionate." *Thurber v. New York Central, etc., R. Co.*, 2 I. C. R. 742, 755; 3 I. C. C. R. 473. In this case a difference of from 40 to 100 per cent in the case of groceries was found to be unreasonable and a reduction was ordered. In the case of *Scofield v. Lake Shore & M. S. R. Co.*, 2 I. C. R. 67; 2 I. C. C. R. 90, the opinion is expressed that the difference in rates between carloads and less than carloads is generally too great. In that case a large difference was justified in case of petroleum oil, for the reasons

that but few goods can be shipped in the same car with it without damage, and that cars used for that purpose become unfitted for the carriage of general merchandise. In *Duncan v. Atchison, T. & S. F. R. Co.*, 4 I. C. R. 385, a difference of more than 100 per cent was deemed unreasonable. It is said in the opinion: "The importance of maintaining a reasonable relation between carload and less than carload rates on the same commodity is seen from the fact that any material difference between them in favor of the larger shipments must result in altogether debarring small dealers from participation in the trade."

Where a rate is given of so much per car, regardless of the quantity loaded, it is manifest that an unjust discrimination might be practiced by furnishing to favored shippers cars of larger capacity. *Ross v. Kansas City, St. J. & C. B. R. Co.*, 111 Mo. 18; 19 S. W. Rep. 541. The only just practice is to prescribe a minimum weight for the carload and to charge the carload rate per 100 pounds upon any excess. *Leonard v. Chicago & Alton R. Co.*, 2 I. C. R. 599; 3 I. C. C. R. 241; *Ross v. Kansas City, St. J. & C. B. R. Co.*, 111 Mo. 18; 19 S. W. Rep. 541.

In *Thurber v. New York Central, etc., R. Co.*, 2 I. C. R. 742; 3 I. C. C. R. 473, it was held that where a carload rate was given on a commodity or class of goods shippers were entitled to the carload rate whether the carload consisted of goods shipped by one consignor to one consignee, or by one consignor to several consignees, or by several consignors to several consignees. "The circumstance of many consignors to many consignees," says the commission, "of a full carload to the same destination, is too unimportant in the item of cost of handling to demand a difference in the rate. Fractional differences exist in all business, as they do under all laws imposing burdens, and in business are supposed to be equalized by average charges."

The hundredweight and the carload are two recognized units of quantity and computation in the general freight business. The making of a different rate for any quantity more than 100 pounds and less than a carload, does not seem to have been practiced or demanded. The next distinctive unit after the carload would seem to be the trainload. The statutes of Colorado, however, authorize the railroad commissioner to make lower rates on lots of more than five carloads than on carloads. 4th Ann. Rep. I. C. C. 245. On the other hand, the statutes of Minnesota expressly require that one carload shall be transported at as low a rate per ton as more than one. 4th Ann. Rep. I. C. C. 252. The same principle which justifies a discrimination between carload and less than carload lots, would seem to justify a discrimination between carloads and trainloads. A trainload, forming a single consignment, can undoubtedly be handled at a less cost per car or per ton than a trainload made up of cars collected from different shippers at the same or different towns, and consigned to different consignees. Accordingly, it has been held in England that a lower price per ton for coal in trainloads than in carloads was justified by the difference in cost, and was not an undue preference. *Oxlade v. North Eastern Ry. Co.*, 1 C. B. (N. S.) 454; 87 E. C. L. R. 454; *Ransome v. Eastern Counties Ry. Co.*, 1 C. B. (N. S.) 437; 87 E. C. L. R. 437; *Ransome v. Eastern Counties Ry. Co.*, 4 C. B. (N. S.) 135; 93 E. C. L. R. 135; *Ransome v. Eastern Counties Ry. Co.*, 8 C. B. (N. S.) 708; 98 E. C. L. R. 708.

The question does not appear to have been passed upon in this country. Commissioner Knapp, in his opinion in *Brownell v. Columbus & C. M. R. Co.*, 4 I. C. R. 285, 298; 5 I. C. C. R. 638, says: "Much the same argument which justifies a reduced rate to carload shippers would justify a still lower rate when shipments are made, as frequently happens, by the trainload. But no reduction from carload rates in favor of trainload shipments would be sanctioned by the commission or permitted by the law-making authority. Such a concession would concentrate the commerce of the country in the hands of a few great capitalists, and would be an obvious and intolerable encroachment upon the rights of a vast majority of shippers." These views are to some extent supported by the reasoning in *Thurber v. New York Central, etc., R. Co.*, 2 I. C. R. 732; 3 I. C. C. R. 473, and *Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.*, 4 I. C. R. 373. These cases tend to support the view that a carload rate upon any commodity would be unjust, unless the course of business was such that the rate would be available generally to the producers or shippers of that commodity.

12. Discriminations in aid of industrial enterprises or based upon the uses and purposes for which the goods are intended or upon the ultimate destination of the traffic.—The principal case holds that a railroad company may lawfully discriminate in its rates for carrying coal in favor of a manufacturer as against a dealer in coal at the same place, although the service performed for each is precisely the same. Although this is a practice which has been more or less indulged in by railroad companies, its legality does not seem to have been elsewhere passed upon. The correctness of the principal case has been doubted by a writer in 28 *American Law Review*, 139. The practice has been condemned by the interstate commerce commission though not judicially passed upon. *Hurlbut v. Lake Shore & M. S. R. Co.*, 2 I. C. R. 81; 2 I. C. C. R. 122; *In re Louisville & N. R. Co.*, 4 I. C. R. 157; *In re Iowa Barb Wire Co.*, 1 I. C. R. 605; 1 I. C. C. R. 17. In the latter case it is said: "Concerning the practice formerly prevailing at Nashville, where the railroad company exercised the exclusive power of determining upon the persons to whom the so-called 'manufacturers' rate' should be given, it need only now be said that it seems to have been a clear violation of the act, and would have been forbidden by the commission, had not the carrier abandoned it." The practice is one which cannot be justified upon principle. It is opposed to the rule of equity which is imposed by the common law and by statute, and which puts all persons and corporations upon the same footing. The fact that coal is to be used for manufacturing purposes is not a circumstance that in any way affects the cost of transportation. Nor is there any sound reason why the manufacturer should be favored any more than the merchant, the hotel keeper or the farmer. Moreover, the rule allowing such discriminations is one which has no definite limitations, and it places in the hands of a railroad the dangerous and arbitrary power of determining whether any such favors shall be granted, and, if at all, then of selecting the places and the enterprises to be favored. It is also opposed to the principle of the cases now to be noticed, touching discriminations based upon the ultimate destination of traffic. This matter of determining whether particular enterprises should be favored and to what extent, is one appropriate for legislative regulation, and

it has been provided for in some states. See *Louisville, etc., R. R. Co. v. Fulgham*, 91 Ala. 555; 8 South. Rep. 808.

In *Twells v. Pennsylvania R. Co.* (Penn. Sup. Ct. 1864), 3 Am. Law Reg. (N. S.) 728, it appeared that the defendant charged six cents more per 100 pounds upon oil from Pittsburgh to Philadelphia when the oil was destined for New York than when it was destined for Philadelphia only. At this time the defendant's road did not extend beyond Philadelphia, but it made through contracts to New York, and the object of this discrimination was to control the shipment beyond Philadelphia. The court held that "when the service is the same the compensation must be the same also," and pronounced the discrimination unjust and illegal and enjoined its continuance. We quote from the opinion as follows: "Now, it is clear that if they receive oil at Pittsburgh to be carried to Philadelphia, it can make no difference to them, either in the risk or cost of transportation, whether Philadelphia is the point of ultimate destination of the oil, or whether the consignee intends that it shall afterwards be started anew on another line and forwarded from Philadelphia to New York. The point of final destination of the freight is a matter in which they have no interest as carriers over their own road. * * * They cannot say to a shipper at Pittsburgh of any domestic products, 'You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A. to New York we will carry it over our lines at certain rates. If you send it by any other than A. our charges will be higher.' This is a discrimination that cannot be allowed. Conceding it would put in the power of defendant a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same whether its motive be to benefit third parties or the railroad company itself."

The doctrine of this case has been repeatedly affirmed in England. *Denaby Main Colliery Co. v. Manchester, S. & L. Ry. Co.*, 11 App. Cas. (H. L.) 97, 1885; S. C. in Court of Appeals, L. R., 14 Q. B. D. 209, 1884; S. C., L. R., 13 Q. B. D. 674, 1884; *Toomer v. London, C. & D. Ry. Co.*, 3 Nev. & Mac. 79, 1877; *Ayr Harbor Trustees v. Glasgow & S. W. Ry. Co.*, 4 Eng. Ry. & Canal Traffic Cas. 81, 1881; *Ayr Harbor Trustees v. Glasgow & S. W. Ry. Co.*, 4 Eng. Ry. & Canal Traffic Cas. 90, 1881; *Swinden v. Great Western Ry. Co.*, 4 Eng. Ry. & Canal Traffic Cas. 349, 1884.

In the first of these cases the traffic in coal from a certain group of mines near Doncaster to the seaport of Grimsby was in question. It appeared that the Hamburg-American line of steamers had been using Welch coal in their trade to the West Indies. They were willing to use Grimsby coal provided they could get certain reduced prices. To enable the Grimsby dealers to make these prices and thus introduce the coal to the West India trade, the railroad company allowed a rebate upon all coal thus disposed of. It also appeared that there had been little trade in Grimsby coal to ports south of Harwich, and a certain dealer there undertook to develop this traffic, and he was allowed a rebate of 6 d. per ton upon all coal shipped to such ports. Both these discriminations were held to be illegal.

The same views have been held by the interstate commerce commission. *Logan v. Chicago & N. W. R. Co.*, 2 I. C. R. 431; 2 I. C. C. R. 604; New

York Produce Exchange v. New York Central, etc., R. Co., 2 I. C. R. 553; 3 I. C. C. R. 137. But see **Boston Chamber of Commerce v. Lake Shore, etc., R. Co.,** 1 I. C. R. 754; 1 I. C. C. R. 436.

Analogous to these cases are those which hold that no discrimination can be made in favor of passengers on account of the purpose with which they travel. Thus it has been held that reduced rates to settlers or commercial travelers are an unjust discrimination. **Smith v. Missouri Pac. R. Co.,** 1 I. C. R. 611; 1 I. C. C. R. 208; **Lawson v. Chicago & G. T. R. Co.,** 1 I. C. R. 369; 1 I. C. C. R. 147; **Associated Wholesale Grocers v. Missouri Pac. R. Co.,** 1 I. C. R. 393; 1 I. C. C. R. 156; **Elvey v. Illinois Cent. R. Co.,** 2 I. C. R. 804; 3 I. C. C. R. 652.

13. Discriminations based upon the origin of the traffic, or made in favor of traffic which would otherwise seek a different route.—In **Ragan v. Aiken,** 9 Lea, 609, the defendant had become proprietor of a railroad fifteen miles in length, and was operating it under its charter. Plaintiff was a merchant in Rogersville, one terminus of the road, and paid from twenty to twenty-five cents per 100 pounds for the transportation of merchandise over the road. At the same time the defendant carried like goods for other merchants doing business at a distance from Rogersville, and not in competition with merchants of the latter place, for fifteen cents per 100. This rate was necessary in order to secure the business, which would otherwise have taken other channels. The plaintiff complained of this discrimination and sought to recover back the excess he had paid over fifteen cents per 100. The court held that, as the discrimination was necessary in order to get the business, and as the merchants favored were not in competition with the plaintiff, it was reasonable and lawful. The court says: "If the charge upon the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may, nevertheless, lower the charge of another person if it be to the advantage of the company, not inconsistent with the public interest and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a different route. Under these circumstances we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged if the charges on their goods were reasonable."

A very similar case to the foregoing is that of **Ex parte Benson & Co.,** 18 S. C. 38, 1882. Benson & Co. were cotton buyers at Hartwell, Ga. The natural and usual outlet for such cotton was down the Savannah river. In order to secure the traffic for his road the superintendent of the Greenville and Columbia Railroad Company proposed to Benson & Co. that if they would ship all the cotton purchased by them in Hartwell during the season of 1877-78 over his road, via Anderson, to Charleston or Augusta, at the regular tariff rates, the company would refund to them at the end of the season a rebate of one dollar a bale. This offer was accepted and complied with, and the road in the meantime having passed into the hands of a receiver, Benson & Co. petitioned the court for an order upon the receiver to pay the rebate. It was proven by the

testimony of the superintendent that the rebate was necessary in order to secure the business; that the persons who hauled their cotton to Anderson also bought their supplies there, so that the road got the benefit of transporting both the cotton and the supplies. The trial court held that the discrimination was unlawful and dismissed the petition, but the Supreme Court took a contrary view. The case was determined on common-law principles, and, after referring to authorities, the court says: "As extracted from these authorities and many others which might be cited, the extent of the common-law rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in charge does not per se invalidate the contract as inequitable and against public policy; but to have this effect, there must be an element of unreasonableness in the charge itself, as applied to the services rendered, between the parties to the contract, and without comparison to the charges against others. Independent of statutes and provisions in their charters restricting corporations within certain limits, they stand in the community as other individuals, invested with the power to contract and be contracted with, and the validity of their contracts depends upon the same principles which govern in contracts between natural persons. It is too vague to say, in general terms, that the contract is inequitable and against public policy, and, therefore, not enforceable. To be void on such grounds, it must run counter to some known principle of equity or contravene some well-established doctrine of public policy forbidding it. We do not know that this contract was obnoxious to any of these objections; nor, in the face of the testimony of the experienced superintendent who gave it, can we say that it was unnecessary. The cotton which he brought to the head of his road at Anderson C. H. was grown in the state of Georgia, at a distance from Anderson. The Savannah river, running between Anderson and Hartwell, was its natural outlet to market, and, no doubt, afforded cheaper transportation. With these obstacles in the way, it required some inducement to be held out so as to bring this cotton to the Greenville road. And so long as the charges against others were not unreasonable, and in no way increased by the rebate offered to it, what ground is there for the courts to interfere?" The discrimination in question, therefore, was upheld by rejecting the principle of equality, which we have shown elsewhere is sustained by the great weight of authority. 8 Am. R. R. & Corp. Rep. 700, note.

The case of *Shipper v. Pennsylvania R. Co.*, 47 Penn. St. 338, 1864, supports the same views. Plaintiffs were dealers in flour and grain at Philadelphia and owned a flouring mill at Wheeling, Va. They brought flour from Wheeling to Pittsburgh and shipped it over the defendants' road to Philadelphia. They were compelled to pay a higher price for the transportation of this flour than was charged for flour of domestic production over the same line. The court sustains this discrimination both upon general principles of law and under a statute of the state. The court says: "In no just sense can the adoption and enforcement of a rate of tolls for the transportation of merchandise which is the subject of domestic trade carried in the prosecution of such trade, and a different rate for similar articles imported or carried in the conduct of a foreign or extra-territorial trade, be regarded as a dis-

crimination between individuals. The benefits of reduction on domestic trade are extended to all persons alike, and the burdens upon that which is not domestic are imposed equally upon all. We are not prepared to say that a railroad company may not discriminate in its rate of tolls in favor of domestic trade over foreign: in favor of home products over those which are extra-territorial, especially when the railroad lies wholly within the state. Ownership may not be a reasonable ground for a distinction, but weight, bulk, value, place of production, and many other things may be."

The case of *New York Board of Trade v. Pennsylvania R. Co.*, 3 I. C. R. 417; 4 I. C. C. R. 447, and subsequent cases growing out of it are important in this connection. The complaint was that imported goods were carried to interior points in the United States upon through bills of lading, for a much less rate for the domestic carriage than was charged for domestic goods of the same kind carried over the same line of road and between the same termini, and that this was an unjust discrimination against dealers in domestic goods within the act to regulate commerce. In some cases the charge for domestic goods was more than five times the charge for foreign goods. See 3 I. C. R. 425. The railroads were obliged to carry for the rates made in foreign parts or abandon the traffic. The commission sustained the complaint and ordered that certain of the defendants should "forthwith cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of destination, or at any other than the same rates established in such inland tariff." Pp. 451, 452. The commission held that in the carriage of foreign merchandise from a port of entry to the place of its destination in the United States "the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition under the operation of the act to regulate commerce which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line." And again it is said in the opinion: "The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls, rates or charges for, or any difference in the treatment of, home and foreign merchandise in respect to the same or similar service rendered in the transportation when this transportation is done under the operation of this statute. Certainly it would require a proviso or exception plainly engrafted upon the face of the act to regulate commerce before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates or charges made for, or any difference in its treatment for, the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges and treatment for similar services rendered."

Afterwards the commission commenced a proceeding to enforce the order made as against the Texas and Pacific Railway Company, in respect of traffic from New Orleans to Pacific coast points. The latter company contended, as before the commission, that it was justified in making the discrimination between foreign and domestic traffic "because, owing to the competition of sailing vessels and foreign carriers between Liverpool and San Francisco, it could not get any appreciable amount of foreign traffic without meeting the competitive rates by making the rates given." But the court held with the commission and granted the order prayed. In giving his opinion Wallace, J., says: "The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that, unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation." *Interstate Commerce Commission v. Texas & Pac. R. Co.*, 52 Fed. Rep. 187. This decision was affirmed by the Court of Appeals. *Interstate Com. Com. v. Texas & Pac. R. Co.*, 57 Fed. Rep. 948. This court did not decide whether the fact of ocean competition created a dissimilarity of conditions which would justify a difference in rates, but held that, even if such competition did create such dissimilarity, it did not of itself justify the discrimination complained of, and that, in the absence of any evidence as to what was reasonable, the order of the commission should be enforced. The court says: "The final question before the Circuit Court was: 'Is the order of the commission a proper one, and should obedience to it be insisted upon?' In order to decide that question, the answer presented two questions upon the subject of rates: (1) Can ocean competition be regarded, in any event, as creating a dissimilar condition? (2) If it can, is the difference in the existing rates justified by that condition? A third question might have been, but was not, presented, viz., in the event that the first question is answered in the affirmative, and the second is answered in the negative, does the dissimilar condition justify any, and, if so, what, dissimilarity in rates? To answer this question the court should have been informed in regard to the reasonableness of existing rates upon domestic traffic. This court is of opinion that, assuming that the first question can be answered in the affirmative, the second must be answered in the negative, and that an unfair inequality of rates is plainly manifest. There is nothing in the record which enables the court to determine that the assumed dissimilar condition justified any substantial dissimilarity in rates, and it ought not to permit disobedience to an order until it can suggest a better one as a substitute.

"The defendant's apparent position that, inasmuch as substantially dissimilar conditions create dissimilarity in rates, the amount of dissimilarity in rates is not important—cannot be sustained. That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make, is not true. To set aside the order of the commission, and permit the present excessive inequality of rates, in the absence of any attempt to show the reasonableness of the inequality, would not accord with justice."

In *Bigbee & Warrior Rivers Packet Co. v. Mobile & O. R. Co.*, 60 Fed. Rep. 545, it appeared that defendant's usual and customary rate for transporting compressed cotton from Mobile to New Orleans was eighty cents per bale. The plaintiff tendered the defendant 400 bales of compressed cotton at Mobile to be transported to New Orleans at the rate of eighty cents per bale, and tendered the freight money therefor, but defendant refused to accept the cotton except at the rate of one dollar and twenty-five cents per bale. The reasons for this refusal are thus stated by Toulmin, J., in his opinion: "Respondent sets up in justification of its refusal to receive and transport said cotton at 80 cents a bale, and of its demand of \$1.25 a bale, substantial dissimilarity of circumstances and conditions from those under which other cotton is offered by other shippers at Mobile, and received by respondent, to be transported to New Orleans. The substantial dissimilarity of circumstances and conditions as averred by respondent is the fact that the relator was engaged in transporting cotton and other merchandise upon its vessels on the Bigbee river, and that this cotton was received by the relator at Demopolis, Ala., and was transported upon its vessels to Mobile for the purpose of reshipping the same over respondent's line, or some other line of railroad, to New Orleans. And respondent further says, in justification, that it had agreed with the Louisville and Nashville Railroad Company, and certain other railroad companies within a specified or given territory, for the purpose of maintaining a uniform rate upon all shipments of cotton from Demopolis and some other points in Alabama, in vessels plying the Alabama rivers, and received at Mobile to be reshipped and transported to New Orleans, that it would charge \$1.25 a bale for such transportation, and that the 400 bales of cotton in question were so received from Demopolis. Respondent, in short, says that it refused to receive and transport said cotton, as stated by relator, (1) because it was not offered under like circumstances and conditions as an ordinary or usual shipment of cotton over its line and connecting lines from Mobile to New Orleans; and (2) because of the agreement referred to." The court overruled this defense and says: "What substantial dissimilarity in circumstances and conditions is there, then, between a shipment of cotton from Mobile to New Orleans by a person who has received the cotton from Tuskaloosa, or any other part of Alabama, for illustration, and a shipment of cotton from Mobile to New Orleans by a person who has received it from Demopolis, Ala.? There is a dissimilarity in the circumstance that one lot of cotton came from one point and the other lot from another point. But this is not a substantial dissimilarity, such as is contemplated by the law, and it is not every dissimilarity of circumstance or condition that justifies a dissimilarity of rates. 'That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make is not true.' *Interstate Commerce Commission v. Texas & Pac. Ry. Co.*, 6 C. C. A. 653; 57 Fed. Rep. 955. The circumstances and conditions to be considered are those which bear upon the transportation by the particular carrier, and under which such transportation is conducted. They must have direct bearing upon the traffic over the line on which the discrimination is made. The dissimilarity of circumstances and conditions set up by respondent in justification of its claim is not the outcome of competition by water routes or any other competitive rail-

road line not subject to the Interstate Commerce Act. Respondent's position on this point cannot be sustained. I am unable to see that the circumstance that the cotton in question came from Demopolis to Mobile, to be reshipped thence to New Orleans, has any direct bearing upon the traffic over respondent's line to New Orleans."

In *Thompson v. London & N. W. R. Co.*, 2 Nev. & Mac. 115, 1875, the facts were as follows: The plaintiffs were brewers at Burton-on-Trent. T. & Co. and C. & Co. were also brewers at the same place, and had their premises connected by side tracks with the Midland Railway Company. The Midland and the defendant were competitors for traffic from Burton to various points. The defendant had a charge of 9 d. per ton for terminal services, and also charged 1 s. per ton for cartage when it performed that service. To secure the traffic of T. & Co. and C. & Co., who did not have to pay these charges to the Midland by reason of their side tracks, the defendant performed for them gratis the services for which plaintiffs and others paid 1 s. 9 d. The plaintiffs claimed that this was an undue preference of T. & Co. and C. & Co., and an undue prejudice of themselves, and it was so decided by the commission. In the opinion it is said: "It is, however, said in answer to their complaint that the Traffic Act prohibits only undue advantages, and that an advantage given by a railway company to obtain traffic for which it competes with another railway company is not undue. Such a proposition cannot, in our opinion, be laid down unreservedly. It may be true in certain circumstances; it would not be so in others, and what degree of favor can lawfully be shown to some persons to the prejudice of others under the pressure of competition can only be decided in any case that arises by a reference to its special circumstances. In the case before us some of the traffic would, independently of the bounty, be sent to the North Western; the rest would naturally fall to the Midland, for the simple reason that the brewers and the station are contiguous and joined by lines of rails. The local relation of the Midland to the traffic is such that it must have the preference, and if another company under such circumstances aims at diverting that traffic into its own channels, we think, looking at the matter in its bearings on the rights under the statute of third parties, that their interests ought not to be sacrificed or placed at a disadvantage in the pursuit, however otherwise legitimate, of that object."

The same facts were passed upon afterwards in *Evershed v. London & N. W. R. Co.*, 2 Q. B. D. 254, 1877, in which the plaintiff sued to recover back what he had paid in excess of the rates charged the preferred brewers. In this case it appeared that there were three brewers whose breweries were connected by side tracks with the Midland railroad. The Divisional Court gave judgment for the plaintiff, holding that there was an inequality under the act of 1845 and an undue preference under the act of 1854. Mellor, J., observed: "We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers unless, at all events, there is a sufficient consideration for such reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic."

The case was affirmed in the Court of Appeal, 3 Q. B. D. 134, and *Bram-*

well, L. J., said: "It was also urged that the three firms had something in the nature of a natural advantage to the benefit of which they were entitled in their dealing with the defendants. I am of opinion that is not so. They have, indeed, an advantage which enables them to put a pressure on the defendants, but if the defendants yield to it they must give an equal advantage to the plaintiff. If the three firms were a mile nearer than the plaintiff to the defendants' station, doubtless the defendants might charge the plaintiff a larger sum for carriage. But the only advantage here that these firms have is that they have easy access to another railway. So they might have to a canal or ordinary highway. But these considerations, though a reason for the diminished charge, do not justify the extra charge to the plaintiff."

Colton, L. J., thought the three brewers had no advantages with respect to the defendants' railway except the facility of making a good bargain, and said: "In order to render lawful an inequality of charge the goods must be carried under different circumstances, and goods are carried under the same circumstances when the cost to the railway company of carrying them is the same."

The case was in all respects affirmed in the House of Lords. L. R., 3 H. L. App. Cas. 1029, 1878. Lord Cairnes said: "It appears to me that the question, in cases like the present, must always be simply this: Is the plaintiff in the action obliged to pay one sort of remuneration for services which the railway performs for him, while the company performs the same services for other traders either for less remuneration or for no remuneration at all?"

"The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic."

It was also held in *Budd v. London & N. W. R. Co.*, 4 Ry. & Can. Cas. 393, that the giving of lower rates to traffic which had the benefit of competition was an undue preference within the act of 1854, and the plaintiff was allowed to recover back what he had been charged in excess of the lower rates. The following cases also contain dicta or intimations to the same effect. *Ransome v. Eastern Counties R. Co.*, 1 C. B. (N. S.) 437; *Garton v. Bristol & Exeter R. Co.*, 6 C. B. (N. S.) 639; *Harris v. Cockermouth & Workington R. Co.*, 1 Ry. & Can. Cas. 97.

But it was held by the House of Lords in *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.*, L. R., 11 App. Cas. 97, 1885, that no private action would lie under the act of 1854 to recover overcharges, on the ground that they were an undue prejudice under that act. The case of *Budd v. London & N. W. R. Co.*, 4 Ry. & Can. Cas. 393, was overruled upon this point, and it was further held that *Evershed's* case must be held to have been based upon the equality clause of the act of 1845 alone.

In the very recent case of *Phipps v. London & N. W. R. Co.*, (1892) 2 Q. B. 229, decided by the Court of Appeal, the following facts appeared: Plaintiff had iron furnaces at Duston. He complained that the defendant gave an undue preference to the owners of iron furnaces at B. and I. in its rates upon pig iron conveyed to the South Staffordshire markets. B. and I. were respectively eleven and twenty-two miles further from the market than D. There

was no competition at D., but there was at B. and I. by means of the Midland Railway Company. The rates from B., I. and D. respectively were .95 d., .84 d. and 1.05 d. per ton per mile. B. and I. were grouped and paid the same rate, which was 5 s. 8 d. per ton, while the rate from D. was 5 s. 2 d. per ton. The commissioners held that the fact of there being competition for the traffic at B. and I. was a circumstance which might be taken into consideration in determining whether there was any undue preference, and decided against the claim of undue preference. In the Court of Appeal it was held that whether there was an undue preference or not was a question of fact from the decision of which no appeal lay from the commissioners, but whether a particular circumstance was proper to be considered by them in determining the matter was a question of law upon which the court could pass, and they held that, as to the particular circumstance in question, the fact of competition at B. and I., it was a proper one to be considered by the commissioners in determining whether there was an undue preference.

Lord Herschel delivered a very exhaustive opinion, in course of which he says: "Can we say that the local situation of one trader, as compared with another, which enables him by having two competing routes to enforce upon the carrier by either of these routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the question as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantage he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the act which indicates that when you are left at large, for you are left at large, as to whether as between two traders the company is showing an undue and unreasonable preference to the one as compared with the other, you are to leave that circumstance out of consideration any more than any other circumstance which would affect men's minds. * * * I am not suggesting that there may be such an excessive difference in charge made in cases of competition, as that it would be unreasonable and unfair when you are looking at the position of the one trader as compared with the other."

In reference to the equality clause of section 90, act of 1845 (see § 3 of this note), he said: "The words of the equality clause have no elasticity at all;

there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by that statute." P. 249.

In the same case Kay, L. J., said: "While the argument was going on I put a case that was in my mind, in order to illustrate what seemed to me a great injustice, if we are prevented from taking this into consideration. Suppose that by a competing route, by another line of railway of equal importance, and which gave in every way the same facilities, the traffic had gone from either of the places in question to the common market at a particular rate for years; the London and Northwestern Railway Company, I will assume, had lost that traffic altogether, or had never been able to secure it, to use the word used in the statute; and I am assuming it could not be of the least importance to the persons who are now complaining by which route the traffic went, it would make no difference to them if the rates charged for taking it either way were the same, can it be said that the commissioners have no right, in a case of that kind, to say that the railway company are not giving an undue preference by taking this traffic to the common market for the same rates which the competing line would charge? There is no possible disadvantage to the complainant in their doing so; it will get into the market at that rate of carriage by whichever route it goes. I think the interpretation clause which I have read rather points to this, that it is an element, in considering whether undue preference has been given or not, to see whether giving that preference puts the complaining party under any kind of disadvantage. It seems to me that it would be extremely unjust to say to the railway company, 'You shall not do this in order to secure the traffic to yourselves,' and that whether it were in the interest of the public or not that they should secure the traffic. I cannot conceive it can possibly be said with truth that giving the same facilities to a trader to put his goods in the common market that another competing line gives is not in some sense in the interest of the public."

The following may also be consulted in this connection: *Baxendale v. Great Western R. Co.*, 5 C. B. (N. S.) 309; 94 E. C. L. R. 309; *Diphwys Casson Slate Co. v. Festiniog Ry. Co.*, 2 Nev. & Mac. 73; *Lough v. Outerbridge*, 66 Hun, 103; *Lough v. Outerbridge*, 68 Hun, 486; *Munhall v. Pennsylvania R. Co.*, 92 Penn. St. 150; *Ex parte Koehler*, 31 Fed. Rep. 315; *Lehmann v. Southern Pac. R. Co.*, 2 I. C. R. 80; 2 I. C. C. R. 122; *Manufacturers & Jobbers' Union v. Minneapolis & St. L. R. Co.*, 3 I. C. R. 115; 4 I. C. C. R. 79; *New York Produce Exchange v. New York Central, etc., R. Co.*, 3 I. C. R. 553; 3 I. C. C. R. 137.

14. Discrimination by means of classification and between commodities.—The subject of the classification of freight by railroads has received very considerable attention from the interstate commerce commission. In an early case before them it is said: "The method of classification, which consists of grouping a large number of articles into each of several different classes, with different rates for the transportation of each class, has long existed in the operation of railroads. In making up a class by this method articles of the same kind are usually grouped together in the same class as far as this can

be done ; but as the articles in each class are so very numerous there is a very great diversity of such articles, and it results that there are generally but few things of the same kind that can be placed in one class. This is unavoidable, because the articles are so numerous while the classes are but few. All articles embraced in a class are usually charged the rate of that class, whatever it may be. To carrier and shipper alike it indicates the amount of rate charged. One of the many embarrassments connected with the transportation of freight by railroads consists in the fact that there is such a lack of uniformity in the classifications of freight found in the different portions of the country. The three associations mentioned in evidence in this case are not all that there are of this description in the United States ; yet each of them has different classifications, and, having different classifications, in this way charge different rates for what in many cases is a substantially similar service. * * * This mode of making rate by classification is intended to be for the convenience of the railroad company, and also for the accommodation of the shippers, and long experience has shown that it is the best and most practical way yet devised for dealing with the subject. To demonstrate that there are occasional inequalities of rate upon some of the articles thus grouped together in one class as compared with others in that class is not to prove that the whole system is wrong, but simply that there is or may be some slight or occasional difference in the rate charged upon some one article in proportion to its value, bulk or weight, when compared with another, that inflicts no substantial wrong upon any one, and is one of the mere incidents of the service by this method of transportation. To show that one article of freight in a class is charged a much higher or lower relative rate than it ought to be charged when compared with another in that or some other class, may, under all the circumstances, establish the result that a mistake has been made in its classification that amounts to an unjust discrimination. In grouping articles together in a class for the purpose of fixing rates upon these articles several considerations are usually deemed by the carrier of a very controlling nature. Among these may be mentioned bulk and space occupied, value, hazardous and extra hazardous freight, liability to waste or injury in transit, weight or the like. * * * As the freight rates of a railroad are laid for the purpose of obtaining revenue from its operation, it is but just and fair that they should be so distributed upon the different articles transported, as far as this can be done, so as to bear upon all with relative equality. This being true, the considerations to which we have referred as influencing carriers in making these rates are just in themselves, although their application to different articles of freight is frequently difficult, and must unavoidably require the exercise of great care to avoid occasional unjust discrimination." *Pyle v. East Tenn., Va. & Ga. R. Co.*, 1 I. C. R. 767 ; 1 I. C. C. R. 465, 1888.

The question of classification has been many times before the commission, and interesting remarks on the subject will be found in the following cases : In *re Underbilling*, 1 I. C. R. 813 ; 1 I. C. C. R. 683 ; *Thurber v. New York Central, etc., R. Co.*, 2 I. C. R. 742 ; 3 I. C. C. R. 473 ; *Warner v. New York Central, etc., R. Co.*, 3 I. C. R. 74 ; 4 I. C. C. R. 32 ; *Andrews Soap Co. v. Pittsburgh, etc., R. Co.*, 3 I. C. R. 77 ; 4 I. C. C. R. 41 ; *New York Board of Trade v. Pennsylvania R. Co.*, 3 I. C. R. 417 ; 4 I. C. C. R. 447 ; *Coxe Bros.*

v. Lehigh Valley R. Co., 3 I. C. R. 460; 4 I. C. C. R. 535; Schumacher Milling Co. v. Chicago, R. I. & P. R. Co., 4 I. C. R. 373. The question is also discussed in the annual reports of the commission. See 1st Rep., 1 I. C. R. 667; 2d Rep., 2 I. C. R. 267; 3d Rep. 48; 4th Rep. 31; 5th Rep. 23; 7th Rep. 50.

The general principle of classification has been frequently approved by the courts. *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460; *Twells v. Pennsylvania R. Co.*, (Sup. Ct. Penn.) 8 Am. Law Reg. (N. S.) 728.

It is manifest that an unjust discrimination may be practiced by means of a wrong or unfair classification, and it is important to know what principles are to be applied in determining whether the classification of an article or commodity has been properly made. As to the general principles involved the interstate commerce commission says: "A matter so extensive and difficult as the classification of freights must evidently be mainly governed by general rules. This is indispensable to any system of classification at all. The alternative is a rate for every commodity separately, instead of a class rate for articles of enough similarity in some controlling feature to be classed together. The rules for making classifications should very clearly be reasonable and fair, but under the best rules exact justice may not always be possible. Sometimes a classification necessary for certain articles is disadvantageous to carriers, and sometimes the application of a reasonable rule may be disadvantageous to a shipper of some commodity. The rule for all general purposes must be just, but its application in a particular case may be severe. If in such a case an exception can be made without leading to worse results than are produced by an adherence to the rule, it is only reasonable to allow the exception. But if the exception demanded is in effect the creation of another rule which it may be necessary to apply generally, or even to many articles, and which may be difficult in practice and objectionable in principle, there are good reasons why it should not be ordered." *Andrews Soap Co. v. Pittsburgh, C. & St. L. R. Co.*, 3 I. C. R. 77; 4 I. C. C. R. 41.

Further general rules, as well as applications of them, will appear from the cases adjudicated, if that expression may be applied to decisions of the interstate commerce commission. In the case last cited the plaintiff manufactured a soap named "American Castile Soap." It was advertised and sold as a toilet soap, and was put by defendant in class 2. Laundry soaps were put in class 4. Toilet soaps are as a rule much more valuable than laundry soaps, but it was shown that plaintiff's soap was not very different from laundry soaps and that it came in competition with them. The classification was sustained, it being held that the carrier need not analyze freight to see if it is different from what it was represented to be, but that he might classify commodities according to the representations under which they were put upon the market. But where soaps were about equal in value, were put up in similar boxes, were made for the same purposes and both represented to be for both toilet and laundry use, it was held that they should be classified alike, and the putting of one in second class and the other in fourth class was held an unjust discrimination against the former. *Beaver v. Pittsburgh, C. & St. L. R. Co.*, 3 I. C. R. 564; 4 I. C. C. R. 733. Pearline, or soap powder, was put in fourth

class and paid a rate of seventy-three cents per 100 pounds, from New York to Atlanta, while common soap was put in sixth class, with a rate of thirty-three cents. The former was about twice as valuable and was more liable to injury from accident or dampness. Both were used for the same purposes and were, therefore, in competition. It was held that the difference was too great, and it was ordered that Pearline be placed in the fifth class. Risk and value were held to be proper elements to be considered in classification, but the general rule was laid down that articles of a competitive character must be so classed that no injustice results. *Pyle v. East Tenn., Va. & Ga. R. Co.*, 1 I. C. R. 767; 1 I. C. C. R. 465.

Patent medicines were put by the defendants in first class in less than carloads, and in third class in carloads. Ale, beer and mineral waters were put in third and fifth classes respectively. The market value of the medicines was about three times that of the other articles, but it was shown that their cost or intrinsic value was about the same, and it was claimed that they should have the same classification. It was held that the carrier properly regarded the market value of goods in making his classification, and, in view of the value of the articles mentioned and the volume of traffic in them, the classification was sustained. *Warner v. New York Central, etc., R. Co.*, 3 I. C. R. 74; 4 I. C. C. R. 82. In case of a similar complaint regarding the classification of stomach bitters, it was held that the proper classification of an article was to be judged by comparison with the classification of other articles similar in character, quality and conditions of transportation. *Myers v. Pennsylvania R. Co.*, 2 I. C. R. 403; 2 I. C. C. R. 578.

Different sorts of coal and different sizes and grades of coal, having different values, may be placed in different classes or otherwise given different rates, but the rates upon coals that come in competition with each other must be relatively just and fair, so that no undue advantage is given to one over another. *Louisville, etc., R. Co. v. Crown Coal Co.*, 48 Ill. App. 228; *Savitz v. Ohio & M. R. Co.*, (Ill.) 37 N. E. Rep. 235, affirming 49 Ill. App. 375; *Coxe Bros. v. Lehigh Valley R. Co.*, 3 I. C. R. 460; 4 I. C. C. R. 535; *Nitshill, etc., Coal Co. v. Caledonian R. Co.*, 2 Nev. & Mac. 47. Giving anthracite coal a higher rate than iron ore, pig iron and other low grade freight is unreasonable. *Coxe Bros. v. Lehigh Valley R. Co.*, 3 I. C. R. 460; 4 I. C. C. R. 535.

Celery should be classed with cauliflower, asparagus, lettuce, green peas, string beans, oyster plant and other vegetables rather than with berries, peaches, grapes and other fruits. *Tecumseh Celery Co. v. Cincinnati, etc., R. Co.*, 4 I. C. R. 318; 5 I. C. C. R. 663. Putting raisins in a higher class than dried fruits, when they are not more valuable, is an unjust discrimination. *Martin v. Southern Pac. R. Co.*, 2 I. C. R. 1; 2 I. C. C. R. 1. Different rates may be given on cotton compressed than on cotton uncompressed. *Lotspeich v. Central R. & B. Co.*, 73 Ala. 306; *New Orleans Cotton Exchange v. Illinois Central R. Co.*, 2 I. C. R. 777; 3 I. C. C. R. 534. But in the latter case it was held that the difference should not exceed the actual and necessary cost of compression. Putting railroad ties in a special class with a higher rate than other lumber is an unjust discrimination, and not to be justified by a desire to cheapen the price to the railroad company. *Reynolds v. Western New York, etc., R. Co.*, 1 I. C. R. 685; 1 I. C. C. R. 393. In the opinion it

is said: "Rates established by a common carrier under the influence of a desire to keep upon its line a material for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified either in morals or in law. Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates." See, also, to the same effect, *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517; 82 N. E. Rep. 311.

A carload of lumber, consisting of plank dressed on one side, and some scantling, was held to be of the same class as a carload of planks, which had been prepared for making troughs, and that both should have the same rate. *New York, T. & M. R. Co. v. Gallaher*, 79 Tex. 685; 15 S. W. Rep. 694. In *Hurlburt v. Lake Shore & M. S. R. Co.*, 2 I. C. R. 81; 2 I. C. C. R. 122, it was held that hub blocks should be classed with lumber rather than with unfinished wagon material, which had a higher rate. Giving finished and unfinished chamber sets the same rate was held an unjust discrimination against the latter, because they were less valuable, and more of them could be packed in a car. *Potter Mfg. Co. v. Chicago & G. T. R. Co.*, 4 I. C. R. 228; 5 I. C. C. R. 514.

Harvard Co. v. Pennsylvania Co., 3 I. C. R. 257; 4 I. C. C. R. 212, is an interesting case on the subject of classification and rating as between articles and commodities. The complainant was a manufacturer of surgical chairs, which were shipped singly in less than carload lots. They were partly knocked down and crated when prepared for shipment. They were given a double first-class rate along with barber, dental and reclining chairs, boxed or crated. These latter were both more valuable and more bulky. Pianos and organs boxed, sideboards and desks crated, and sewing machines boxed or wrapped, were simply first class. It was held that, considering the weight, bulk and value of surgical chairs, and their capability of being packed with other goods, as compared with the other articles mentioned in respect of the same qualities, the surgical chairs were rated too high, and should be reduced to simply first class. In the opinion by Bragg, Commissioner, it is said: "The question presented by this proceeding is whether the rates charged in the transportation of surgical chairs are relatively too high, as compared with the rates for the carriage of other property with which these chairs as freight may in substantial respect be compared, as to bulk, value, expense of handling and of carriage. As to the rates upon these other articles, such as barber chairs, dental chairs and reclining chairs, or of the rates on pianos, cabinet organs, sideboards, desks and sewing machines, no question as to their reasonableness or justice has been made before us. If the question was the mere price, defendants' charge for transporting these surgical chairs from Canton to any of the cities named in the evidence, without regard to the rates charged upon other articles from and to the same points, and of other freight carried in the same car or train from which the carrier was deriving revenue, it would without any doubt be a very great service rendered for a very small price, and this would be more or less true of any service rendered by the railroad companies in the transportation of any particular kind of freight for any distance. But the business of a railway carrier is not made up of the transportation of one

article only ; it relates to the movement of a large and diversified traffic. It results, therefore, in this, as in numerous other instances, that a different standard of estimate may be safely consulted, such as that of other freight carried contemporaneously and a comparison of the charge made for other articles in which the same calculations as to value, bulk and expense of handling and of carriage would to a considerable extent enter, and for the purposes of such comparison it is not indispensably necessary that the articles should be competitive with each other, though if they are competitive then this feature must more strongly bring to view the fact of discrimination in rates, if there be such." And again: "That a rate maker may and in fact should take into consideration, as shown by the evidence in this case, such controlling conditions, in preparing a classification, as bulk and space occupied, the weight of the article as compared with its dimensions, its value, whether it can be so loaded into a car as to make a full carload, and whether as a matter of fact it is hauled in carloads as well as in less than carloads, are each and all true. But the mere fact that one article, for example, sewing machines, is shipped in greater quantities than surgical chairs, when each as a rule is shipped in less than carload quantities, and of no large difference in bulk, weight and value, and of no appreciable difference in expense of handling and of haul, that this alone should constitute in itself any reason why the former should enjoy lower rates or classification than the latter, merely for the reason that they are shipped in greater quantities, is a doctrine to which we cannot give our assent. In such a case mere quantity, not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling and carriage, cannot be allowed to affect rates in the transportation of property. The small dealer is entitled to just and reasonable rates on his product, as much so as many and large dealers, and any discrimination between them in rates based upon the idea that the one class of persons makes many shipments while the other makes but few is unjust and unreasonable under the provisions of the act to regulate commerce. It is a discrimination in favor of one kind of traffic as against another in the vital matter of rates, and is unlawful."

That great care must be exercised in adjusting rates upon articles and commodities which come in competition with each other is illustrated by cases relating to the rates upon grain and grain products, and upon live hogs and hog products. *Bates v. Pennsylvania R. Co.*, 2 I. C. R. 715; 3 I. C. C. R. 435; *Bates v. Pennsylvania R. Co.*, 3 I. C. R. 296; 4 I. C. C. R. 281; *Board of Trade of Chicago v. Chicago & Alton R. Co.*, 3 I. C. R. 233; 4 I. C. C. R. 158; *McMorran v. Grand Trunk R. Co.*, 2 I. C. R. 604; 3 I. C. C. R. 252; *Squire v. Michigan Central R. Co.*, 3 I. C. R. 515; 4 I. C. C. R. 611; *Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.*, 4 I. C. R. 373. Also by the cases already cited relating to the rates upon the different sorts and grades of coal. In *Nitshill, etc., Coal Co. v. Caledonian R. Co.*, 2 Nev. & Mac. 47, it appeared that the defendant had two branches from its main line leading to different collieries, from which coal was shipped to Granton by rail and thence by sea to market. The defendant made two rates, one for gas coal and one for common coal. Gas coal included cannel coal only and plaintiffs were the only shippers of that kind of coal. Other mines produced what was called

splint coal and this was also used for making gas, and so came in competition with the cannel coal. It was held that the classification and higher rate for cannel coal was an undue prejudice of the plaintiffs and that they should be charged the same. In the opinion it is said : "The question is now narrowed to this — whether splint and cannel have enough in common, in respect of their gas-producing qualities and of the uses to which they are applied, to be competitive, and to make it a preference or prejudice under the Traffic Act if they are carried under similar conditions at unequal rates, and whether an undue preference is created by the rates at which they are carried to Granton by the Caledonian Ry. Co. * * * It appears to us on the whole that the two articles cannot but be regarded as competitive, and that there ought not to be any difference in the rates at which they are carried."

The following cases also to some extent concern the subject of this section: *Thurber v. New York Central, etc., R. Co.*, 2 I. C. R. 742 ; 3 I. C. C. R. 478 ; *New York Board of Trade v. Pennsylvania R. Co.*, 3 I. C. R. 417 ; 4 I. C. C. R. 447 ; *Perry v. Florida Central, etc., R. Co.*, 3 I. C. R. 740 ; 5 I. C. C. R. 97 ; *Woodger v. Great Eastern Ry. Co.*, 2 Nev. & Mac. 102.

15. Group rates.— It is a common practice to give to all the manufacturers or producers of a given article or commodity in a limited district the same rate to a common market, although the haul varies somewhat for each shipper, according to his location in the district. This is known as "grouping," or making "group rates," and may or may not result in an unjust discrimination according to the circumstances and conditions of the case. In *Howell v. New York, L. E. & W. R. Co.*, 2 I. C. R. 162 ; 2 I. C. C. R. 272, it appeared that the defendant made a group rate on milk from a large number of its stations to New York. These stations varied in distance from 21 miles to 183 miles from the latter city. The rate was sustained on account of the great expense of handling the traffic at stations as compared with the expense of transportation alone, the interest of the public in having an abundant supply of fresh milk, and because there was a demand for all the milk brought to market at reasonable prices. In *Imperial Coal Co. v. Pittsburgh & L. E. R. Co.*, 2 I. C. R. 436 ; 2 I. C. C. R. 618, it appeared that all the coal mines within a radius of forty miles about Pittsburgh were given a group rate of ninety cents per ton to lake ports. All the mines were worked at about the same expense, all things considered, and they produced about the same quality of coal, which came into direct competition. The rate was sustained, the commission finding that there was no undue prejudice of the nearer mines or preference of the farther ones. Some stress is also put upon the fact that coal is a common necessity and that the public are interested in having it cheap. It is observed by Schoonmaker, Commissioner, as follows: "The question of the lawfulness or relative reasonableness of the uniform rate, to the extent to which it is applied, is to be determined apart from the interests of the carriers, and in regard to the rights and interests of the coal producers in the territory, in view of the conditions of the business disclosed in the testimony. The carriers are the common servants of all the producers and shippers of the coal, and are bound to serve them all reasonably and without unjust discrimination or undue prejudice; but it is not the duty of carriers to disregard distance or natural disadvantages of location, and equalize access to markets for all engaged in a common business,

though differently situated. It may, however, be lawful, and be supported by just public considerations, for carriers to give equal access to markets in localities of dissimilar distances; and it may involve no material difference in expense to the carrier. No producer or shipper has an exclusive right to supply a market, and the interests of consumers and of the general public may justify carriers in enlarging the field from which the demand for a commodity may be supplied on terms of equality for transportation. That is only a recognition of the principle that the general interests are paramount to individual or local interests. In other cases it may be unreasonable, and, therefore, unlawful, to give equal rates to diversely situated localities where a demand does not exist for a larger supply, and where conditions intervene that give an undue preference or advantage to the less favorably situated localities. In all such cases, therefore, the question whether a favorably situated locality is unjustly discriminated against by a grouped rate, or an undue preference or advantage given to the less favorably situated locality, is principally one of fact and not solely of law."

While the group rate was sustained in this case, the principle is clearly laid down that "if the effect of disregarding distance is to impose burdens for the benefit of others on those who have the natural advantage of location, it is unjust and cannot be sanctioned."

The following are somewhat similar cases in which group rates upon coal were sustained: *Coxe Bros. v. Lehigh Valley R. Co.*, 3 I. C. R. 460; 4 I. C. C. R. 535; *Rend v. Chicago & N. W. R. Co.*, 2 I. C. R. 313; 2 I. C. C. R. 540.

A group rate, or "blanket rate," as it was called, upon petroleum oils from all points east of the ninety-seventh meridian to the Pacific coast, was sustained in *Rice v. A., T. & S. F. R. Co.*, 3 I. C. R. 263; 4 I. C. C. R. 228. This made the rate uniform for all oil-producing points, and was made necessary by the competition of all-water lines, and of part rail and part water lines. *Interstate Com. Com. v. Detroit, etc., R. Co.*, 57 Fed. Rep. 1005, and *Texas & P. R. Co. v. Kuteman*, 54 Fed. Rep. 547, also tend to support group rates.

Poughkeepsie Iron Co. v. New York Central, etc., R. Co., 3 I. C. R. 248; 4 I. C. C. R. 195, and *Boston Chamber of Commerce v. Lake Shore, etc., R. Co.*, 1 I. C. R. 754; 1 I. C. C. R. 436, have a bearing on the subject of group rates.

In England the decisions would not seem to be so favorable to group rates, though the principles applied are the same. In *Denaby Main Colliery Co. v. Manchester, etc., R. Co.*, 3 Nev. & Mac. 426, it appeared that coal mines working the same bed of coal and occupying a district about twenty miles across were grouped and charged the same rate. The plaintiffs were fifteen miles nearer to market than the most distant. It was held that the plaintiffs were unduly prejudiced, and that a mileage rate should be charged. Different iron works were located along the Furness railway within a distance of twenty miles. They all obtained ore and coke from the same sources, made the same quality of iron and sent it to the same market. The works were all grouped and charged the same rate on their product out, but the nearer mines were charged less on materials in. The plaintiffs were the nearest to market, and the group rate was held to be an undue prejudice against them. All the works marketed their iron largely at Sheffield, which was distant about 119

miles from the nearest works and 139 miles from the remotest. No principle seems to be applied, but the question is determined as one of fact, and the difference in distance held to be too great to justify a group rate. *North Lonsdale Iron & Steel Co. v. Furness R. Co.*, 7 Ry. & Can. Traffic Cas. 146. Group rates were sustained in *Lloyd v. Northampton, etc., R. Co.*, 3 Nev. & Mac. 259, but here the extreme difference in distance was only two and one-half miles. The case of *Denaby Main Colliery Co. v. Manchester, S. & L. Ry. Co.*, L. R., 13 Q. B. D. 674; S. C. on appeal, 14 Q. B. D. 209; S. C. in House of Lords, 11 App. Cas. 97, doubtless involved the same rates in question before the commissioners in the first English case above cited. The suit was by the railway company against the colliery company to recover freight on coal. The defendant set up a counterclaim for overcharges, based in part upon the group rate. It was held by all the courts that no action would lie for a breach of section 2 of the Traffic Act, and it followed that no question arose as to whether a group rate was an undue prejudice against the defendants. It was held by the Divisional Court that the group rate was a violation of the equality clause in section 90 of the Railway Clauses Consolidation Act of 1845, but the contrary was held in the Court of Appeal and in the House of Lords. Section 90 will be found in section 3 of this note.

See further, *Budd v. London & N. W. R. Co.*, 36 L. T. (N. S.) 802; 4 Ry. & Canal Traffic Cas. 393; *Ransome v. Eastern Counties Ry. Co.*, 4 C. B. (N. S.) 135; *Phipps v. London & N. W. R. Co.*, (1892) 2 Q. B. 229.

The English act of 1888 (51 & 53 Vict. chap. 25, § 29) sanctions group rates, "provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference." See 2d Ann. Rep. I. C. C., Appendix I; 2 I. C. R., Appendix I, pp. ix, xiv. This section would leave the group rate in the same position as before, since group rates were not prohibited before unless they were an undue preference, and they are not authorized now if they are.

16. Discrimination between localities.—Both the English Traffic Act of 1854 and the Interstate Commerce Act expressly forbid unjust discrimination for or against localities. In *Liverpool Corn Traders' Assn. v. London & N. W. R. Co.*, 7 Ry. & Can. Traffic Cas. 125, it is said: "Probably nothing has been alleged against railway companies which has been more bitterly resented by the trading community than the differential treatment of two different districts by railway companies serving both localities." The same evil has existed extensively in this country, and was one of the prominent causes leading to the passage of the Interstate Commerce Act.

In an early case decided by the commission it is said: "The act to regulate commerce is intended for the protection of the general public, and its pervading principle is equality for all persons and communities under substantially similar circumstances and conditions. This demands such adjustments of rates as shall not discriminate unduly in favor of the business of some localities, and prove destructive to similar pursuits in other localities, and prohibits carriers from imposing excessive rates where the absence of competition affords opportunity to do so, and thus unfairly stimulate favored communities at the expense of others. The larger cities and commercial centers usually enjoy valuable advantages because the interests of carriers and the existence

of competition sufficiently guard them. But one object of the law is that the strong shall not have undue advantages over the weak, and that minorities shall be protected and their interests guarded so that substantial equality may exist for all." *Boards of Trade Union v. Chicago, M. & St. P. R. Co.*, 1 I. C. R. 608; 1 I. C. C. R. 215.

In *Chicago & Alton R. Co. v. People*, 67 Ill. 11, it is said that the common law forbids unjust discrimination between communities and localities for the same reason as between individuals. We have shown elsewhere that all unjust discrimination is contrary to the common law, and the general rule would embrace discrimination between localities as well as between individuals. 8 Am. R. R. & Corp. Rep. 700, note. A definite personal injury would be less easily shown in such case, and this may account for the absence of litigation on the subject.

It is unlawful for a railroad company to favor one community at the expense of another, or to equalize the diverse advantages of different localities by a system of rates which places them all upon a par in the same market. "Each locality is entitled to have and retain as against all other localities the benefits which naturally accrue to it by reason of its advantageous location." *Abbott v. Canadian Pac. R. Co.*, 4 I. C. R. 274; 5 I. C. C. R. 612. "That rates should be fixed in inverse proportion to the natural advantages of competing towns, with the view of equalizing 'commercial conditions,' as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its location and natural conditions, and any exaction of charges unreasonable in themselves or relatively unjust, by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute." *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 4 I. C. R. 65; 5 I. C. C. R. 264. To the same effect: *Chamber of Commerce v. Great Northern Ry. Co.*, 4 I. C. R. 230; 5 I. C. C. R. 571; *Skinningsgrove Iron Co. v. Northeastern R. Co.*, 5 Ry. & Can. Traffic Cas. 244.

The fact that one locality has the advantage of competition in carriage is held not to justify a railroad in giving it rates which are relatively unjust to other localities. "A company cannot have equal rates with other companies at the cost of inequalities in its own system merely that it may not be excluded from competing." Sir Frederick Peel, in *Liverpool Corn Traders' Assn. v. London & N. W. R. Co.*, 7 Ry. & Can. Traffic Cas. 125, 143. "The principle of relative justice applied is that where a carrier, by reason of competitive conditions, or for other reasons, serves certain localities at very low rates, the concessions made must not subject other localities or other patrons dependent on the same carrier to undue or unreasonable prejudice or disadvantage, but there must be an equitable adjustment of rates so that there is no unjust discrimination between competitors in like pursuits. There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce normal and reasonable rates to retain business for its line, and where corresponding reductions to points not affected or less affected by destructive competition might be unreasonable. But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of the competitive conditions, remu-

nerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it accepts the legal obligation that its service shall be impartial to all who sustain similar relations to the traffic, and for whom the service itself is not substantially dissimilar." *Manufacturers & Jobbers' Union v. Minneapolis, etc., R. Co.*, 3 I. C. R. 115; 4 I. C. C. R. 79. On the propriety of taking into account the fact of competition in such cases, see the authorities cited in section 13 of this note.

The result of the cases seems to be that the fact that one locality enjoys competition in transportation is not a factor to be considered in determining whether the rates between that and other localities served by the same road are relatively just. In addition to the cases cited are the following: *Abbott v. Canadian Pac. Ry. Co.*, 4 I. C. R. 274; 5 I. C. C. R. 612; *Raymond v. Chicago, M. & St. P. R. Co.*, 1 I. C. R. 627; 1 I. C. C. R. 230; *Boards of Trade Union v. Chicago, M. & St. P. R. Co.*, 1 I. C. R. 608; 1 I. C. C. R. 215; *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 4 I. C. R. 65; 5 I. C. C. R. 264; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Illinois Central R. Co. v. People*, 121 Ill. 304; *Budd v. London & N. W. Ry. Co.*, 36 L. T. (N. S.) 802; S. C., 4 Ry. & Can. Traffic Cas. 393; *Liverpool Corn Traders' Assn. v. London & N. W. Ry. Co.*, 7 Ry. & Can. Traffic Cas. 125. The general rule laid down by these authorities is, that rates, as between localities, should be relatively just and equal. In applying this general rule the important question is as to what factors or considerations may be taken into account in determining the relative justness and equality of rates. Undoubtedly the principal elements to be considered are those which relate to the cost of service and the renumeration character of the traffic. Every circumstance which affects the cost of service, as between two localities served by the same road, such as difference in length of haul, or difference in cost of handling or working the traffic, affords a legitimate basis for a difference in rates. *Illinois Central R. Co. v. People*, 121 Ill. 304; *Boards of Trade Union v. Chicago, M. & St. P. R. Co.*, 1 I. C. R. 608; 1 I. C. C. R. 215; *Bates v. Pennsylvania R. Co.*, 2 I. C. R. 715; 3 I. C. C. R. 435; *Manufacturers & Jobbers' Union v. Minneapolis & St. L. R. Co.*, 3 I. C. R. 115; 4 I. C. C. R. 79; *Board of Trade of Chicago v. Chicago & A. R. Co.*, 3 I. C. R. 233; 4 I. C. C. R. 158; *Rice v. Western N. Y. & Pa. R. Co.*, 3 I. C. R. 162; 4 I. C. C. R. 131; *Squire v. Michigan Central R. Co.*, 3 I. C. R. 515; 4 I. C. C. R. 611; *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 4 I. C. R. 65; 5 I. C. C. R. 264; *Abbott v. Canadian Pac. R. Co.*, 4 I. C. R. 274; 5 I. C. C. R. 612; *Ransome v. Eastern Counties R. Co.*, 1 C. B. (N. S.) 437; 87 E. C. L. R. 87; *Richardson v. Midland Ry. Co.*, 4 Ry. & Can. Traffic Cas. 1; *Girardot v. Midland Ry. Co.*, 4 Ry. & Can. Traffic Cas. 291; *Town Commissioners of Newry v. Great Northern Ry. Co.*, 7 Ry. & Can. Traffic Cas. 184. The volume of traffic to one place may be so much greater than to another that it can be worked more economically, and this is held to justify a difference in rates in favor of the place having the greater traffic. *Richardson v. Midland Ry. Co.*, 4 Ry. & Can. Traffic Cas. 1; *Manufacturers & Jobbers' Union v. Minneapolis & St. L. R. Co.*, 3 I. C. R. 115; 4 I. C. C. R. 79. But see *Girardot v. Midland Ry. Co.*, 4 Ry. & Can. Traffic Cas. 291.

A railroad cannot be said to discriminate against a locality which it does not serve, although it may make rates to other localities which give the latter an advantage over the former. *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 4 I. C. R. 65; 5 I. C. C. R. 264.

It is held that there may be an unjust discrimination between localities although they are not in competition. *Illinois Central R. Co. v. People*, 121 Ill. 304. Upon this point the court says: "The injustice spoken of is not that resulting from the destruction of local competition, but that resulting from overcharging. Undoubtedly, injustice may result to a given locality, and thus to every individual interested in its business, by giving rates to a fairly competing point, which will enable that point to take the business away from the given locality. That, however, is not the only way by which a given locality and its citizens may be injured by unjust discrimination. It can hardly be necessary to argue that a discrimination against a given locality, where there is charged for the transportation of freight to or from it an amount which the law does not allow, is unjust, no matter whether other localities are only charged what the law allows, or are charged less than the law allows; and it must also be equally obvious, that in a case of this kind each individual shipper is, in fact, injured to the amount of the excess which he is required to pay beyond the amount which the law allows, although he may, in fact, be ignorant at the time that the amount which he is required to pay is beyond the amount allowed by law. The effect falls in the first instance upon him, although it is true that he may ultimately indemnify himself by charging the amount up to the purchasers of that which is shipped; but then it falls upon them, and is an unjust discrimination to their injury."

The fact that a town or locality has made large contributions in aid of a railroad, is no reason why it should have preferential rates. *Lincoln Board of Trade v. B. & M. R.*, 2 I. C. R. 95; 2 I. C. C. R. 147.

It would be impossible to go into the details of the cases relating to discrimination between localities, without undue expansion of this note. In addition to the cases already cited in this section we refer to the following upon the same subject: *Harwell v. Columbus & W. R. Co.*, 1 I. C. R. 631; 1 I. C. C. R. 236; *Crews v. Richmond & D. R. Co.*, 1 I. C. R. 703; 1 I. C. C. R. 401; *Lincoln Board of Trade v. Mo. Pac. R. Co.*, 2 I. C. R. 98; 2 I. C. C. R. 155; *Detroit Board of Trade v. Grand Trunk R. Co.*, 2 I. C. R. 199; 2 I. C. C. R. 315; *Milwaukee Chamber of Commerce v. Flint & Pere Marquette R. Co.*, 2 I. C. R. 393; 2 I. C. C. R. 553; *Logan v. C. & N. W. R. Co.*, 2 I. C. R. 431; 2 I. C. C. R. 604; *New Orleans Cotton Exchange v. Illinois Central R. Co.*, 2 I. C. R. 777; 3 I. C. C. R. 534; *Kemble v. Lake Shore, etc., R. Co.*, 3 I. C. R. 830; 5 I. C. C. R. 166; *Poughkeepsie Iron Co. v. New York Central & H. R. R. Co.*, 3 I. C. R. 248; 4 I. C. C. R. 195; *Kaufman Milling Co. v. Missouri Pac. R. Co.*, 3 I. C. R. 400; 4 I. C. C. R. 417; *Anthony Salt Co. v. Missouri Pac. R. Co.*, 4 I. C. R. 33; 5 I. C. C. R. 299; *Chamber of Commerce of Minneapolis v. Great Northern R. Co.*, 4 I. C. R. 230; 5 I. C. C. R. 571; *Board of Trade v. Alabama Midland R. Co.*, 4 I. C. R. 348; *Broughton & P. Coal Co., v. Great Western Ry. Co.*, 4 Ry. & Can. Traffic Cas. 191; *Skinningrove Iron Co. v. North Eastern Ry. Co.*, 5 Ry. & Can. Traffic Cas. 244; *Greenwood v. Lancashire, etc., Ry. Co.*, 6 Ry. & Can. Traffic Cas. 39; *Phipps v.*

London & N. W. R. Co., (1892) 2 Q. B. 229; Interstate Com. Com. v. Cincinnati, etc., R. Co., 56 Fed. Rep. 925; Interstate Com. Com. v. Detroit, etc., R. Co., 57 Fed. Rep. 1005.

17. Discriminations against express companies and against carriers of express matter.—It has been held by the Supreme Court of the United States that railroad companies are not obliged to furnish express companies facilities for doing an express business upon their roads, in the manner in which such business is usually conducted, unless it has by usage held itself out as a common carrier of such companies and their business, or unless the duty has been assumed by special contract or imposed by statute. *Express Cases*, 117 U. S. 1, 1885. So far as appeared in those cases such privileges were never granted, except in pursuance of a definite written contract fixing the rights and duties of the parties, and such contracts usually provided for their termination upon notice. In the cases before the court such contracts between the plaintiff express companies and the defendant railroad companies had been duly terminated, and the defendants refused to renew them or to accord the plaintiffs the usual facilities or any facilities for doing an express business, except to carry freight for them upon the same terms as for any other member of the public. The express companies sued to compel the defendants to grant them the usual or reasonable facilities for such business. The Supreme Court held that they were not entitled to the relief and directed the suits to be dismissed. Six judges concurred in the opinion and two dissented. It is impliedly if not expressly held that the railroad companies by affording express companies the usual facilities under special contracts, did not hold themselves out as common carriers of such companies and their business, and that the making of a special contract with one company did not oblige them to make similar contracts with other companies or to afford them equal facilities. The decision of the lower courts will be found in 10 Fed. Rep. 210; 3 McCrary, 147.

This case has been followed in North Carolina and is in accordance with an earlier decision in Massachusetts. *Atlantic Express Co. v. Wilmington & W. R. Co.*, 111 N. C. 463; 16 S. E. Rep. 393; *Sargent v. Boston & Lowell R. Co.*, 115 Mass. 416.

Prior to the decision of the Supreme Court of the United States above referred to, it had been held by a number of federal judges that railroad companies were under obligation to afford express companies reasonable facilities for carrying on their business. *Dinsmore v. Louisville, etc., R. Co.*, 2 Fed. Rep. 465; *Texas Express Co. v. Texas & Pac. R. Co.*, 6 Fed. Rep. 426; *Southern Express Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 799; *Southern Express Co. v. St. Louis, etc., R. Co.*, 10 Fed. Rep. 210.

It has also been held in a number of cases that a contract by which a railroad company gives to an express company the exclusive right of doing an express business on its road, is an unjust discrimination and void and that it is bound to treat all companies alike. *Sandford v. Railroad Co.*, 24 Penn. St. 378; *New England Express Co. v. Maine Central R. Co.*, 57 Maine, 188; *International Express Co. v. Grand Trunk R. Co.*, 81 Maine, 92; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Dinsmore v. Louisville, etc., R. Co.*, 2 Fed. Rep. 465; *Texas Express Co. v. Texas & Pac. R. Co.*, 6 Fed. Rep. 426; *Southern Express*

Co. v. Memphis, etc., R. Co., 8 Fed. Rep. 799. And see, also, Union Locomotive Express Co. v. Erie Ry. Co., 37 N. J. L. 23; Camblos v. Philadelphia & R. R. Co., 9 Phila. 411.

It has been held that express companies do not come within the Interstate Commerce Act. In re Express Companies, 1 I. C. R. 677; 1 I. C. C. R. 749; United States v. Morsman, 42 Fed. Rep. 448; 3 I. C. R. 112. See, also, 2d Ann. Rep., 2 I. C. R. 251.

There has been much controversy in England between the railroad companies and the carriers, who correspond to our express companies. The railroad companies have endeavored to discriminate against the carriers in various ways, as by charging the carriers more for the same service than was charged to other members of the public, by making rates and classifications which should work to the disadvantage of the carrier, by charging a gross sum which should include carriage and delivery, and by compelling carriers to pay this sum, though they did their own delivering, and by affording facilities to themselves or their agents in receiving and delivering goods, which were denied to the carriers. It has been repeatedly held that the fact that one requiring the services of a railroad company is a carrier, is not a circumstance that differentiates the service, or justifies any difference in charge or treatment. *Parker v. Great Western R. Co.*, 3 Eng. R. & C. Cas. 563; 7 M. & G. 253; 49 E. C. L. R. 252; *Edwards, Assignee of Parker, v. Great Western R. Co.*, 11 C. B. 588; 73 E. C. L. R. 588; *Parker v. Great Western R. Co.*, 11 C. B. 545; 73 E. C. L. R. 545; *Piddington v. South Eastern Ry. Co.*, 5 C. B. (N. S.) 111; 94 E. C. L. R. 111; *Great Western R. Co. v. Sutton, L. R.*, 4 Eng. & I. App. 226; *Goddard v. London & S. W. R. Co.*, 1 Nev. & Mac. 308. It has been held in a number of cases that a box, bale, hamper or other package of merchandise to one address, cannot be charged more, if it is made up of several small parcels to different ultimate consignees (commonly called a "packed parcel"), than if made up of goods destined to only one consignee. *Parker v. Great Western R. Co.*, 3 Eng. R. & C. Cas. 563; 7 M. & G. 253; 49 E. C. L. R. 252; *Crouch v. London & N. W. R. Co.*, 2 Car. & Kir. 789; *Parker v. Great Western R. Co.*, 11 C. B. 545; 73 E. C. L. R. 545; *Edwards, Assignee of Parker, v. Great Western R. Co.*, 11 C. B. 588; 73 E. C. L. R. 588; *Baxendale v. North Devon R. Co.*, 3 C. B. (N. S.) 324; *Piddington v. South Eastern R. Co.*, 5 C. B. (N. S.) 111; 94 E. C. L. R. 111; *Baxendale v. London & S. W. R. Co.*, L. R., 1 Exch. 137; *Baxendale v. London & S. W. R. Co.*, 4 H. & C. 130; *Sutton v. Great Western R. Co.*, 3 H. & C. 800; *Great Western R. Co. v. Sutton*, 4 Eng. & I. App. 226. The same ruling is made in *Pickford v. Grand Junction R. Co.*, 3 Eng. R. & C. Cas. 193; 10 M. & W. 399, though it is suggested as a possibility that a slight additional charge might be made on packed parcels, because of the liability to several suits in case of loss, instead of one. The right to charge more for packed parcels is recognized in *Crouch v. Great Northern R. Co.*, 9 Exch. 556. Charging carriers more for packed parcels than is charged to merchants or other members of the public, or charging one carrier more than another, is clearly a violation of the statutory requirement to charge equally to all. *Crouch v. Great Northern R. Co.*, 9 Exch. 556; *Garton v. Bristol & Exeter R. Co.*, 4 H. & N. 33; *Garton v. Bristol & Exeter R. Co.*, 6 C. B. (N. S.) 639; 95 E. C. L. R. 639; *Sutton v. Great Western R. Co.*,

3 H. & C. 800; *Great Western R. Co. v. Sutton*, 4 Eng. & I. App. 226; *Ford & Co. v. London & S. W. R. Co.*, 7 Ry. & Can. Traffic Cas. 111. See, also, on the subject of rates for packed parcels, *Baxendale v. Eastern Counties R. Co.*, 4 C. B. (N. S.) 63; 93 E. C. L. R. 63; *Parker v. Great Western R. Co.*, 6 E. & B. 77; 88 E. C. L. R. 76.

The charging a gross sum to include carriage and also collecting and delivery, is an inequality, and prejudicial to carriers who do their own collecting and delivering. *Pickford v. Grand Junction R. Co.*, 3 Eng. R. & C. Cas. 193; 10 M. & W. 399; *Baxendale v. London & S. W. R. Co.*, 4 H. & C. 130; *Baxendale v. London & S. W. R. Co.*, L. R., 1 Exch. 137; *Parker v. Great Western R. Co.*, 3 Eng. R. & C. Cas. 563; 7 M. & G. 253; 49 E. C. L. R. 252; *Baxendale v. Great Western R. Co.*, 5 C. B. (N. S.) 336; 94 E. C. L. R. 336; *Garton v. Bristol & Exeter R. Co.*, 6 C. B. (N. S.) 639; 95 E. C. L. R. 639; *Baxendale v. Great Western R. Co.*, 14 C. B. (N. S.) 1; 108 E. C. L. R. 1; S. C., 16 C. B. (N. S.) 137; 111 E. C. L. R. 137; *Garton v. Bristol & Exeter R. Co.*, 1 B. & S. 112; 101 E. C. L. R. 112; *Goddard v. London & S. W. R. Co.*, 1 Nev. & Mac. 308; *Menzies v. Caledonian R. Co.*, 5 Ry. & Can. Traffic Cas. 306.

The affording any facilities to its own agents or to favored carriers in the receiving or delivery of goods, which are denied to other carriers, is an undue prejudice of the latter, contrary to the act of 1854. *Garton v. Bristol & Exeter R. Co.*, 3 C. B. (N. S.) 639; 95 E. C. L. R. 639; *Ford v. London & S. W. R. Co.*, 7 Ry. & Can. Traffic Cas. 111; *Cooper v. London & S. W. R. Co.*, 4 C. B. (N. S.) 738; 93 E. C. L. R. 738; *Baxendale v. London & S. W. R. Co.*, 12 C. B. (N. S.) 758; 104 E. C. L. R. 758; *Palmer v. London & S. W. R. Co.*, L. R., 1 C. P. 588; *Palmer v. London, etc., R. Co.*, L. R., 6 C. P. 194; *Parkinson v. Great Western R. Co.*, L. R., 6 C. P. 554; *Garton v. Bristol & Exeter R. Co.*, 1 B. & S. 112; 101 E. C. L. R. 112.

18. Discriminations based upon the shipment of large aggregate or guaranteed quantities.— Whether the giving of special rates to those shipping a large aggregate amount of freight in a given time constitutes an unjust discrimination, is a question upon which there is a contrariety of opinion: In *Concord & Portsmouth R. Co. v. Forsaith*, 59 N. H. 122, 1879, the suit was by the railroad company to recover the freight upon coal transported from Portsmouth to Manchester. A statute provided that "the rates shall be the same for all persons and for like descriptions of freight between the same points." The regular tariff on coal between Portsmouth and Manchester was one dollar and fifty cents per ton. The company, by its published tariffs, allowed a rebate of ten per cent to those transporting more than 500 tons of coal per annum for their own use for manufacturing purposes; also ten per cent to those transporting more than 1,200 tons of merchandise annually, fifteen per cent if more than 2,400 tons, and twenty per cent if more than 6,000 tons. Defendant had shipped less than 500 tons of coal and less than 1,200 tons of merchandise, but he claimed that he was liable to pay only one dollar and twenty cents per ton, that being the lowest rate allowed any shipper. The court held that the statute was declaratory of the common law; that neither the statute nor the common law required an absolute, unvarying equality; that it was reasonable to charge less pro rata for large than for small quantities, and that whether the rates established by the company were reasonably equal was a

question of fact to be determined from all the circumstances of the case. In course of its opinion the court said: "The terms of the statute must receive the interpretation which long-established usage and the custom of the commercial world have given them. That custom, in all branches of business, always has been, and is, to move, care for and sell a large amount of a given commodity, in one parcel or in a given time, at a less price per pound, yard or ton, than a smaller quantity of the same commodity, distributed in many and smaller parcels at different times. The expense of handling, carrying and storing the smaller amount is much greater, pro rata, than that of the same operations upon the larger amount in one body, and a discrimination in favor of the larger dealers is not inequality, but reasonable equality. By another construction the statute would defeat itself; for, taking into account the lessened expense pro rata for transporting the greater amount of property in a single body or in a given time, the carrier would, by absolute equality of rates for all cases, receive a greater price rate for carrying the larger quantity than the smaller, and thereby make an unjust discrimination against the person transporting the largest quantity of goods. Unreasonable equality is inequality." This case does not appear to be argued with the clearness or completeness which usually characterizes the opinions of the New Hampshire court. Some slight support may, perhaps, be found for the same views in the following cases: *Harris v. Cockermouth & Workington R. Co.*, 3 C. B. (N. S.) 698; 91 E. C. L. R. 698; *Rhymney Iron Co. v. Rhymney Ry. Co.*, 6 Ry. & Can. Traffic Cas. 60; *Nicholson v. Great Western R. Co.*, 5 C. B. (N. S.) 366; 94 E. C. L. R. 366; *Nicholson v. Great Western R. Co.*, 7 C. B. (N. S.) 755; 97 E. C. L. R. 755; *Ransome v. Eastern Counties Ry. Co.*, 4 C. B. (N. S.) 135; 93 E. C. L. R. 135; *Johnson v. Pensacola & P. R. Co.*, 17 Fla. 628; *Menacho v. Ward*, 27 Fed. Rep. 529.

The weight of authority, however, is decidedly opposed to the view that a discrimination may be based upon the quantity of freight shipped in a given time. In *Scofield v. Lake Shore & M. S. R. Co.*, 43 Ohio St. 571, 1885, it appeared that the defendant had a contract with the Standard Oil Company by which it agreed to carry oil for that company at ten cents per barrel less than for any other shipper. The agreement was held to be void, and to the argument urged in its support that the Standard Oil Company furnished more freight than any other shipper, and more than all others combined, the court said: "The principle is opposed to a sound public policy. It would build up and foster monopolies, add largely to the accumulated power of capital and money and drive out all enterprise not backed by overshadowing wealth. With the doctrine, as contended for by the defendant, recognized and enforced by the courts, what will prevent the great grain interest of the Northwest, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregated wealth and in league with the railroads of the land, driving to the wall all private enterprises struggling for existence, and with an iron hand thrusting back all but themselves." P. 609.

In *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, it appeared that the plaintiff was a coal miner in Salineville, Ohio, and shipped his coal to Cleveland. The regular rate was one dollar and sixty cents per ton, but a rebate of from

thirty to seventy cents per ton was made to all shipping more than 5,000 tons per year, the amount of rebate depending upon the amount shipped. The plaintiff shipped less than 5,000 tons and had paid at the rate of one dollar and sixty cents per ton. He sued to recover the excess paid by him over the rate paid by the most favored shipper. He was held entitled to recover. The questions involved are quite elaborately discussed by Baxter, J., who says: "The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will, sooner or later, be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

"It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents, or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land, and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress." Welker, D. J., concurred.

This language is quoted and approved by Brewer, J., in *Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 81 Fed. Rep. 652, 655, and is expressly con-

curred in by McKenna and Acheson, JJ., in *Kinsley v. Buffalo, etc., R. Co.*, 87 Fed. Rep. 181. Both these cases involved the same question, which was decided in accordance with the views expressed by Baxter, J. See, also, *United States v. Tozer*, 87 Fed. Rep. 635.

In *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517; 32 N. E. Rep. 311, it was held that an agreement to ship 500 carloads of ties per month did not justify a reduction from the established rate of ten dollars per car. The court states the law to be that "a railroad company engaged in the business of a common carrier is not permitted by the law to discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity as that shipped by his more opulent rival."

In *Providence Coal Co. v. Providence & W. R. Co.*, 1 I. C. R. 363; 1 I. C. C. R. 107, it appeared that the defendant company had a regulation as follows: "For the purpose of facilitating quick dispatch of the coal cars of the company, a discount of ten per cent will be made from the following rates, to any person, firm or corporation, who shall receive consignments of coal, in any one year, amounting to 30,000 tons or upwards, at any one station on the line of this road." It appeared that there was only one person who received as much as 30,000 tons a year. It was held that the rule gave an undue preference to large shippers, was not based upon any correct principle, and was, therefore, contrary to the Interstate Commerce Act. The rate from Providence to Worcester was one dollar per ton. The shipper of 30,000 tons between these points would thus pay \$27,000 freight, while the shipper of 29,000 tons would pay \$29,000, and yet the latter service would not cost more per ton, and the aggregate cost of the service would be less. In the opinion by Judge Cooley it is said: "A discrimination, such as the offer and its acceptance by one or more dealers would create, must have a necessary tendency to destroy the business of small dealers. Under the evidence in the case it appears almost certain that this destruction must result, the margin for profit on wholesale dealings in coal being very small. The discrimination is, therefore, necessarily unjust within the meaning of the law. It cannot be supported by the circumstance that the offer is open to all; for, although made to all, it is not possible that all should accept. Moreover, in testing such a discrimination we must consider the principle by which it must be supported; and the principle which would support a 30,000 ton limitation would support one of 50,000 or 100,000 equally well; the quantity named would be arbitrary in any case. It might easily be so large as practically to be open to the largest dealer only. A railroad company, if allowed to do so, might in this way hand over the whole trade in its road in some necessary article of commerce to a single dealer; for it might at will make the discount equal to or greater than the ordinary profit in the trade; and competition by those who could not get the discount would obviously be then out of the question. So extreme a case would not, however, be needful to show the inadmissibility of such a discount as is here offered; the injustice would be equally manifest if several dealers instead of one were able to accept the offer. A railroad company has no right, by any discrimination not grounded in reason, to put any single

dealer, whether a large dealer or a small dealer, to any such destructive disadvantage."

In commenting upon the wholesale and retail principle as applicable to carriers, it is said: "But when a question of rebates or discounts is under consideration, it might be misleading to consider them in the light of the principles which merchants act upon in the case of wholesale and retail transactions. There is a very manifest difficulty in applying these principles to the conveniences which common carriers furnish to the public, a difficulty which springs from the nature of the duty which such carriers owe to the public. That duty is one of entire partiality" (impartiality?) "of service. The merchant is under no corresponding duty, and may make his rules to suit his own interest, and discriminate as he pleases."

These views are supported by the subsequent cases of *Harvard Co. v. Pennsylvania Co.*, 3 I. C. R. 257; 4 I. C. C. R. 212; *Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.*, 4 I. C. R. 375; *Brownell v. Columbus & C. R. Co.*, 4 I. C. R. 285; 5 I. C. C. R. 638. The opinion of Commissioner Knapp in the last case cited is especially forcible on this subject.

In *Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 81 Fed. Rep. 652, a contract was made between the parties by which the fuel company undertook to ship 100,000 tons of coal per annum, and the railroad company agreed to carry the same at one dollar and sixty cents per ton, and, at the same time, agreed not to carry for others in less quantities than 100,000 tons yearly for less than two dollars and forty cents per ton. The discrimination was held to be against public policy and void. A similar contract was involved in *Goodridge v. Union Pacific R. Co.*, (U. S.) 8 Am. R. R. & Corp. Rep. 684, but as the parties had not shipped the requisite amount to be entitled to the reduced rate, the question now under consideration did not arise.

Some English cases favor the validity of a reduced rate, in consideration of the guaranty of a specified amount of freight. In *Greenop v. South Eastern Ry. Co.*, 2 Nev. & Mac. 319, it appeared that the defendant gave F. certain rebates from the regular rates in consideration of his agreement to send over the defendant's line, from Boulogne to London, 850 tons of goods per month. The defendant made the same offer to others, and also offered a proportionate reduction to those who would guarantee to send any less amount. Plaintiff was engaged in the same business with F., but it was held that F. was not unduly preferred nor the plaintiff unduly prejudiced. In *Nicholson v. Great Western R. Co.*, 5 C. B. (N. S.) 366; 94 E. C. L. R. 366, the defendant entered into a contract with the Ruabon Coal Company, by which it gave it reduced rates on coal, and gave it other advantages of a money value equivalent to a reduction in rates, in consideration of the coal company agreeing, for ten years, to send over the defendant's lines, beyond a distance of 100 miles, sufficient coal each year to yield the defendant £40,000 annual revenue, the same to be in fully loaded trains, seven a week. The plaintiffs were rival coal miners and shippers, and complained of the agreement as an undue preference of the Ruabon Coal Company. The agreement was sustained, not because of the aggregate amount guaranteed, but because the traffic of the Ruabon Company was sent regularly in trainloads, and the reduction in rates

was only fair and reasonable in view of the diminished cost of working the traffic. It is said: "Now, according to the construction we put upon the act of 17 & 18 Vict. chap. 81, it is not contravened by a railway company carrying at a lower rate in consideration of a guaranty of large quantities and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such guaranty." For further proceedings in the case see *Nicholson v. Great Western R. Co.*, 7 C. B. (N. S.) 755; 97 E. C. L. R. 755. And see, also, on the same subject, *Strick v. Swansea Canal Co.*, 16 C. B. (N. S.) 245; 111 E. C. L. R. 245. The decision in the *Ruabon Coal Company's* case is approved, arguendo, in *Evershed's Case*, 2 Q. B. D. 254; 3 Q. B. D. 134; 3 H. L. (App. Cas.) 1029.

19. Reduced rates in consideration of contracts securing to the carrier the whole or some portion of the shipper's business for a specified time or other like advantages — season contracts.—An agreement of a shipper to send his traffic exclusively by a particular railway for a term of years, is held to be no justification for a discrimination in favor of such shipper by such railway. *Diphwys Casson Slate Co. v. Festiniog Ry. Co.*, 2 Nev. & Mac. 73; *Holland v. Festiniog Ry. Co.*, 2 Nev. & Mac. 278; *Rhymney Iron Co. v. Rhymney Ry. Co.*, 6 Ry. & Can. Traffic Cas. 60. In the first of these cases it is said: "Equal treatment does not consist in all being offered a similar agreement, for if the agreement is not for the public interests, it leaves untouched the right of all under the Traffic Act to be put upon equal terms. Now, it is no advantage to the public that a district should be served by only one railway, and a trader ought not to forfeit his right under the statute because he objects to a condition which he may consider to be detrimental to the public interests no less than to himself. And although a company may consult its own fair interests, this does not extend to interests remote from present transactions and from any profits to be made out of them. The Traffic Act would never apply if it were a sufficient answer to a complaint of preference that the favored persons had agreed to aid the company in warding off some threatened or apprehended competition. A railway company cannot compel the company to purchase equality of treatment by imposing conditions of that character, or of those contained in the special agreements of the Festiniog Railway Company. The same offer may be made to all, but circumstances are so unlike that every kind of partiality would ensue if the offer must be accepted or the parties submit to higher charges." See, also, *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 101 E. C. L. R. 112; *Bayles v. Kansas Pac. R. Co.*, 13 Col. 181. So it is an unjust discrimination for the defendant to charge the plaintiff higher than the regular rate because he would not ship by the defendant exclusively. *Menacho v. Ward*, 27 Fed. Rep. 529.

In *Baxendale v. Great Western R. Co.*, 5 C. B. (N. S.) 309; 94 E. C. L. R. 309, it appeared that S. was a large manufacturer of paper at Bristol and sent large quantities of paper to London and to other parts of England reached by the defendant's lines and by rival lines. Plaintiffs had carried for S. between Bristol and London, but defendant, to secure the business, agreed to carry for

S. from Bristol to London at much less than the regular rates in consideration of S. giving the defendant the traffic, and also in consideration of his employing defendant to ship his paper to other points on its lines. It was held that this was an undue preference of S. and an undue prejudice of the plaintiff, who was a carrier of express matter over the defendant's road. The principal question was whether the agreement of S. to send his goods by defendant's line to other points, to the exclusion of rival lines, was a sufficient justification for the reduced rates on goods to London. Upon this point Willes, J., says: "The question, therefore, is reduced to this—whether it is a legitimate ground for giving a preference to one of the customers of the railway, that he engages to employ other lines of the company for traffic distant from and unconnected with the goods in question or their carriage. And we are of opinion that it is not. The goods are the same in quantity and quality, in the cost of receiving and carriage, and in the profit which is thereby made, whether they be received from Somerville or from the complainants; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ them in totally distinct transactions. In this respect the present case is altogether distinguishable from that of Nicholson against the same respondents, in which a difference in charge was sustained upon goods from and to the same places, between persons who sent large quantities at a time and stipulated to send given large quantities every year, and others who declined to do so. The advantages there stipulated for by the company related to the carriage of the goods upon the same line, and directly affected the rate at which they could profitably be carried. In fact, those advantages made a difference similar to that between the selling of goods wholesale and retail—the profit of carrying the goods sent in large quantities at the less rate at which they were carried equalling or exceeding the profit upon the goods sent in smaller quantities at the greater rate at which they were carried. In the present case, as already explained, the advantages stipulated for are wholly distinct from and do not affect the price or profit of the carriage from Bristol to London, and they ought not to be taken into account in determining the charge for such carriage."

In *Harris v. Cockermouth & Workington R. Co.*, 3 C. B. (N. S.) 693; 91 E. C. L. R. 693, the defendant gave special rates to the tenants of Lord L. upon coal, because Lord L. had threatened that if it did not do so he would build an independent railway for the use of his tenants and thereby the company would lose one-third of its traffic. It was held to be an undue preference.

During a rate war the *Houston & T. C. R. Co.* made a secret contract with a cotton shipper to carry his cotton for the season at a fixed price, whether the open rates should be more or less. The war was settled and rates were fixed at a higher price than the contract provided for. Plaintiff paid the higher rates, and, having learned of the contract, sued to recover the excess paid over the contract rate. It was held that the contract was not necessarily an unjust discrimination, but whether it was or not was a question for the jury upon all the facts. *Houston & T. C. R. Co. v. Rust*, 58 Tex. 98. A similar contract was sustained in *Borda v. Philadelphia & R. R. Co.*, 141 Penn. St. 484. Of the latter case it is said in the principal case: "The claim

of the plaintiffs was to recover damages to the amount of upwards of \$60,000 for unjust discrimination in favor of Audenried & Co., rival coal shippers to the plaintiffs, by the payment to Audenried & Co. of rebates on coal shipped from Port Richmond to points beyond New Brunswick at the rate of \$1.65 for steamer coal, and other rates for other grades. It was proved that these rebates were paid under agreements between Audenried & Co. and the defendant, made at the beginning of the season, and to continue throughout the season, and the referee was of opinion and so found, that these contracts for continuous shipments during the whole season at fixed rates constituted such a difference in the conditions and circumstances of the shipments for Audenried & Co. and the plaintiffs, respectively, as to justify the discrimination, and prevent it from being illegal." The case was tried by a referee whose conclusions were confirmed. In course of his opinion he says: "The expediency of permitting special agreements and special rates by railway carriers is one of the questions of the day entering into the problems of railway management. But, until the legislature shall cut up by the roots all special agreements and special rates, I apprehend that it cannot be safely affirmed that all such agreements are per se unlawful although discriminating. The true question in each particular case as it arises is, whether the special agreement is reasonable under all the circumstances, and honestly made with a single eye to the interest of the railway company. If it be so, then the only responsibility resting upon the company is that they be willing to make the same agreement with every other person under the like circumstances."

The obligation that the railroad company should be *willing* to make similar agreements "with every other person under the like circumstances," affords little protection to the public, if the company is not obliged to make the offer public but may keep its special agreements secret.

20. Reduced rates in consideration of collateral agreements not relating to the traffic in question.—In *Root v. Long Island R. Co.*, 114 N. Y. 800, one Quintard entered into a contract with the defendant company by which he was to construct a dock and coal pocket on the lands of the company, of which Quintard was to have the use of part and the defendant of the remainder. In consideration of this the defendant agreed to carry Quintard's coal at a rebate of fifteen cents per gross ton from the regular rates, and to furnish him an office free of rent. The contract was to continue for ten years, at the end of which period the defendant was to purchase the improvements at an agreed valuation. Quintard built the dock and coal pocket at an expense of some \$17,000, and afterwards shipped coal in pursuance of the contract. His assignee sued to recover rebates agreed to be paid by the contract, and the railroad defended on the ground that the contract was against public policy and void. There was a judgment for the plaintiff. The Court of Appeals held that whether the contract created an unjust discrimination was a question of fact under the evidence, and that, as the referee had not found this question one way or the other, the judgment could not be disturbed. The contract also provided that Quintard was to load the cars. It did not provide for the shipment of any specified quantity, but it was understood that the quantity was to be large. The court says: "The facilities which Quintard was to provide for the loading of the coal, his services in

loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court, as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others "

In *Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680; 8 Am. R. R. & Corp. Rep. 684, one question was whether the release of an unliquidated claim for damages would justify an agreement for reduced rates on coal, and it was held in the negative. "To hold a defense thus pleaded to be valid," says the court, "would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported."

In *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517; 32 N. E. Rep. 311, one question was, whether an agreement by a shipper of railroad ties to sell the company ties at a specified price less than the market rates justified an agreement to carry his ties for fourteen dollars per car, while all others were charged twenty-four dollars per car. It was held that whether this agreement of the shipper "relieved the discrimination of its objectionable features, by which it became a reasonable discrimination, was a matter of fact, which was properly submitted to the jury for its determination." The jury found that the discrimination was not reasonable, and their verdict was affirmed.

See, also, the cases cited in sections 18 and 19 of this note, and the case of *Brundred v. Rice*, 7 Am. R. R. & Corp. Rep. 357.

21. Discrimination between connecting carriers.—Nothing in the common law, or in the act to regulate commerce, or in similar acts, requires a railroad company to make arrangements with connecting carriers for the through billing of freight or through ticketing of passengers and the like, and a railroad company may refuse to make such arrangements altogether, or may make them with one connecting carrier and refuse to do so with others, and in such case it will not be guilty of an unjust discrimination or the giving of an undue preference. *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667; *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587; *Kentucky & Ind. Bridge Co. v. L. & N. R. R. Co.*, 37 Fed. Rep. 567; *Little Rock, etc., R. Co. v. East Tenn., etc., R. Co.*, 47 Fed. Rep. 771; *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.*, 51 Fed. Rep. 465; S. C. affirmed, 61 Fed. Rep. 158; *Interstate Com. Com. v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 59 Fed. Rep. 400; *Chicago &*

Alton R. Co. v. Pennsylvania R. Co., 1 I. C. R. 357; 1 I. C. C. R. 86; *In re Joint Rail & Water Rates*, 2 I. C. R. 486; 2 I. C. C. R. 645; *Copehart v. L. & N. R. Co.*, 3 I. C. R. 278; 4 I. C. C. R. 265; *Southern & Isle of Wight Steam Ferry Co. v. London & S. W. R. Co.*, 2 Nev. & Mac. 341; *Napier v. Glasgow & S. W. R. Co.*, 3 Sess. Cas. (3d series) 87; 2 Nev. & Mac. 292.

In the case first cited the defendant operated a short railroad between New Orleans and Lake Pontchartrain. At the lake it connected with lines of steamers which plied between the lake and Mobile. It made a contract with the Morgan Steamship Company, by which it agreed to "pro rate" with it on through business to and from New Orleans, and agreed not to do so with any other steamboat line. The plaintiff operated a rival line of boats, and was compelled to pay local rates on the defendant's road, which were more than the proportion of a through rate received by the defendant. The contract with the Morgan Company was sustained, and the court says: "We cannot perceive anything illicit in this agreement. The plaintiffs do not pretend that the railroad charged them, or the public generally, too much, but that it charged Morgan too little. What law did they violate in so doing? No statute of Louisiana has been infringed; none is quoted by appellants except the charter of the company, and that is silent on the subject. No rule of jurisprudence has been violated so far as we can perceive. The company is a juridical person; its special business is to make contracts in regard to freight, and what is there to prevent it from making an agreement by which a large loan is secured to enable it to extend its road and build its depots, and by which a daily line of fine steamers is secured to connect its short route with the great highways to the east and north? And what is there to prevent its declining "to pro rate" with the Creole and Camelia when it found that the effect of pro rating with several lines was to enable them to engage in the game of competition at the railroad's expense."

But a railroad company cannot discriminate in its local rates, according as traffic comes or goes by one connecting carrier or another. *Samuels v. Louisville & N. R. Co.*, 31 Fed. Rep. 57; *New York & N. R. Co. v. New York & New Eng. R. Co.*, 3 I. C. R. 542; 4 I. C. C. R. 702; *Ayr Harbor Trustees v. Glasgow & S. W. R. Co.*, 4 Ry. & Can. Traffic Cas. 90; *Tooner v. London, C. & D. R. Co.*, 3 Nev. & Mac. 79. See, also, sections 12 and 13 of this note.

In *Indiana River S. S. Co. v. East Coast Trans. Co.*, 28 Fla. 387; 10 South. Rep. 480, it was held that a railroad company, whose line terminated on the Indiana river, where it had a dock and station, could not grant to one line of steamboats the exclusive privilege of landing at the dock and of receiving and delivering freight and passengers thereat. See, also, sections 7, 8 and 9 of this note. Compare *Ilwaco Ry. & Nav. Co. v. Oregon Short Line & U. N. R. Co.*, 57 Fed. Rep. 673; 51 Fed. Rep. 311.

22. Discrimination between oil shipped in tanks and oil shipped in barrels.—Much complaint has been made of discrimination in this regard. Railroad companies are not generally equipped with tank cars for the transportation of oil, but such cars are owned and provided by shippers and intended for their exclusive use. Discrimination has been made by charging more per barrel or per 100 pounds for oil in barrels than for oil in tanks, by charging for the weight of the barrel when no such charge is made for the

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weight of the tank, by allowing for leakage from tanks and not from barrels, and in other ways. All these forms of discrimination have been pronounced to be unjust by the commission and also by the courts. *State ex rel., etc., v. Cincinnati, etc., R. Co.*, 47 Ohio St. 130; 2 Am. R. R. & Corp. Rep. 106; *Rice v. Louisville, etc., R. Co.*, 1 I. C. R. 722; 1 I. C. C. R. 503; *In re Tank & Barrel Rates on Oil*, 2 I. C. R. 245; 2 I. C. C. R. 365; *Scofield v. Lake Shore & M. S. R. Co.*, 2 I. C. R. 67; 2 I. C. C. R. 90; *Rice v. Western N. Y. & Pa. R. Co.*, 3 I. C. R. 162; 4 I. C. C. R. 131; *Rice v. Cincinnati, etc., R. Co.*, 3 I. C. R. 841; 5 I. C. C. R. 193; *Independent Refiners' Assn. v. Western N. Y., etc., R. Co.*, 4 I. C. R. 162.

In *Rice v. Cincinnati, etc., R. Co.*, 3 I. C. R. 841, 854; 5 I. C. C. R. 193, it is said: "The rules of equality are violated when rates are so adjusted between tank and barrel shipments that substantial advantage is secured by those employing the former mode for the transportation of their merchandise. It matters little by what device or arrangement this relative unfairness is accomplished; it must receive condemnation proportionate to the injury which it occasions. The tank shipper may rightfully enjoy the benefits of greater economy and convenience, for these are incident to his business and independent of the carrier's control, but upon no just principle of transportation can he be lawfully favored in the rates themselves. In a contest between different and competing methods of distributing an article of general consumption, every consideration of justice should induce the railroads to stand in a neutral attitude. If absolute impartiality cannot be perfectly maintained, the disadvantage ought not to be on the side of the weaker contestant. Especially is this so when the carrier, failing to provide the special equipment presumably best adapted to a particular traffic, uses the special vehicle of shippers who are able to furnish them, while their less fortunate rivals are compelled to depend upon its ordinary facilities. In such a case, when a species of partnership exists between the carrier and those shippers who supply the vehicle in which their merchandise is most conveniently transported, the rights of competing shippers whose circumstances are not so favorable in this respect should be constantly and effectually protected. In the absence of adequate equipment freely afforded to all patrons alike, the railroads should so adjust rates between those who can and those who cannot furnish their own conveyance that, *in the relative charges to each*, there shall be no discrimination against the dependent shipper."

STATE EX REL. WISCONSIN TEL. CO. v. JANESVILLE ST. RY. CO.

(Supreme Court of Wisconsin, January 30, 1894.)

1. **ELECTRIC WIRES IN STREET.** TROLLEY COMPANY MAY BE COMPELLED TO STRING GUARD WIRES WHERE IT CROSSES THE WIRES OF A TELEPHONE COMPANY PREVIOUSLY LICENSED. A telephone company doing an established business, and having its wires strung in the streets by license of the city, may have mandamus to a street car company, thereafter licensed to use electric power on the same streets, to obey an ordinance requiring it to string guard

wires to its trolley wire in places where it must cross other wires, so as to prevent damage by its breakage, on a showing that relator is in special danger as to the life of its servants and the integrity of its property in case of such breakage, that breakage cannot be prevented altogether and that guard wires are the approved and only safeguard therefor.

2. REASONABLENESS OF ORDINANCE IMPOSING SUCH DUTY. In view of an admission that guard wires are the only safeguard to cross wires, and property connected therewith, in case the trolley wire breaks, an ordinance requiring the street car company to string guard wires at the crossings with other lines of wire is not unreasonable nor an undue exercise of the police power.

3. An ordinance requiring a street car company to string guard wires to its trolley wire "whenever it shall be necessary to cross" telephone or other lines of wire, demands the protection of existing crossings, and, so construed, is not retroactive but merely remedial.

4. DUTY MAY BE ENFORCED BY MANDAMUS. Mandamus is an appropriate remedy to enforce the duty imposed by such ordinance, and the relator is not obliged to wait until damage has actually been sustained.

Miller, Noyes & Miller and *Fethers, Jeffris & Fifield*, for appellant. *Jackson & Jackson*, for respondent.

ORTON, Ch. J. This is an appeal from an order of the Circuit Court sustaining the demurrer of the respondent to the relation of the appellant, and quashing the alternative writ of mandamus. The material facts set out in the relation are briefly as follows: The relator, the telephone company, obtained its right from the state to do business in the city of Janesville, and to erect and maintain poles, cross arms and wires over and through the streets, ways and alleys of said city, and operated telephone wires and erected poles in the streets, ways and alleys, with the permission, consent and approval of said city, from 1879 until the present time, at a great expense, and has now 151 telephones in said city and suburbs. The main trunk lines of the poles and wires have been and are now maintained upon East, Main and Milwaukee streets. All the rights, right of way and easements that it had previously enjoyed as a telephone company were confirmed by an ordinance of said city, dated October 10, 1892, a copy of which is attached hereto, and marked "Exhibit 1," and the company has since exercised and enjoyed the same, and all the said lines and poles have been where they are now for years, with a few exceptions, and where they should be. The relator has complied with the statutes of the state, and paid its license fee, and has a license to do business as a telephone company. The defendant is

a corporation by the laws of the state, and obtained its rights to operate a street railway in said city by horse power by ordinances of said city, dated October 8 and November 25, 1885, and operated the same on the same streets upon which the relator had its poles and wires, among others East, Main and Milwaukee streets. By an ordinance of the city, dated December 15, 1891, the former ordinances were so amended as to give the defendant the right to use "electrical power" in operating its street railway, and on a single or double track, with all necessary curves, turnouts, switches, poles, brackets and wires. The defendant has erected its poles, wires and overhead wires over and above the streets already occupied by the relator in the manner aforesaid, and, among others, East, Main and Milwaukee streets, in said city. The defendant company is compelled to use very strong conductors of electricity to run its cars, and it uses main and trolley wires, which are not insulated, while the wires of the relator are insulated, and, though good and sufficient, can only use feeble and delicate currents of electricity in telephoning. The currents used by the defendant are exceedingly dangerous to property and persons, by setting fires to buildings, and by injuring persons coming in contact therewith. The poles of the relator are liable to break, and the wires to break and fall, by the force of storms, and cannot be prevented; and, when the wires do fall, they make direct crosses with the wires of the defendant, and the high-tension currents of electricity used by the defendant pass in the wires of the relator, and destroy its instruments and other property, and endanger the health of its employees and others, and are liable to set fires in the city. If the defendant had constructed its railway system properly it would have placed "guard wires" at not less than four feet above its trolley wires, and in that manner prevented such serious consequences by restraining and carrying off the high-tension currents safely. Such guard wires, so placed and maintained, are the approved method of avoiding or preventing the threatened mischief. The defendant is required to apply such safeguards by an ordinance of the city, dated October 10, 1892. The relator has complied with said ordinance, and the defendant has failed to do so. This is the substance of the relation.

We are of the opinion that the facts set out in the relation are sufficient to entitle the relator company to the remedy asked for:

(1) The telephone company occupied the streets of the city with its poles and wires, and was in the safe and successful prosecution of its business, under the authority of law, and "by the permission, consent and approval" of the city of Janesville. (2) The defendant company afterwards sets its poles and extends its wires along the same streets, so that its lines frequently cross the lines of the relator, and in such near contact as to endanger the persons in its employment and its property, and threaten the destruction of its business. Has the defendant the right to do this, if it is in its power to prevent the threatened mischief? By the common maxim that one person has no right to use his own to the injury of another, and by the common principles of elementary law, it would seem that it had not. The defendant has intruded upon the established business of the relator in such way as to endanger it and the persons engaged in it, when, by the adoption of such a simple safeguard, and the only practicable one, such danger can be avoided, and the business of both subsist together. Ought not the defendant to be compelled to adopt such safeguard? These facts are admitted by the demurrer. The learned counsel of the respondent insists that the relator had not such priority of its business by any right. It is averred in the relation that it was established according to law, and prosecuted "by the permission, consent and approval" of the city. That would clearly give the relator a right, and that right and its enjoyment were prior to any right of the defendant. The relator's wires are up in the streets, bearing sufficient electrical power to make telephonic communications, and the defendant crosses them in many places with its wires, bearing electrical power sufficient to propel the cars upon its street railway, and the first storm that comes may blow down the poles and wires of the relator, and its wires come in contact with the wires of the defendant, where they cross each other, and become charged with its dangerous currents of electricity, set fire to the buildings in which the telephone instruments are used and injure other property and the persons employed in the "exchange" and other places, so as to endanger or destroy the business of the relator. Ought not the defendant to be compelled to adopt the above safeguards to prevent this threatened mischief, or to withdraw its lines from the vicinity of the relator's wires? The company that caused the mischief ought to repair it.

Section 7 of the ordinance of the city, dated October 10, 1892, imposes this duty upon the company using this "electrical power system" in all cases, and requires it to apply such safeguards under a penalty. But much more is it the duty of such company when it is an intruder upon the already established business of another company. The electric force is the most powerful and dangerous agency of nature, and, even when restrained or controlled by the most perfect machinery and appliances, its high-tension currents are extremely dangerous in many directions. If a municipal corporation has not the inherent provisional or police power to pass ordinances to regulate or restrain the use of such a dangerous agency within the corporate limits, it certainly cannot have such power for any purpose. It is claimed that said ordinance has only future operation or effect. In application to the case, section 7 of said ordinance provided: "Whenever it shall be necessary to cross * * * telephone line or lines or any wires used," etc. Has it not been necessary for the defendant company to cross these telephone lines or wires of the relator since the passage of the ordinance, and is it not now necessary to do so? Then the ordinance, by its terms, is applicable to this case. The ordinance is made to regulate existing things, and things which continue to exist, as the wires of the defendant cross the wires of the relator. Whenever at any time wires so cross this safeguard must be applied. The ordinance has a present and future effect. It is said these wires crossed before the ordinance was passed. That is true, and they have continued to cross ever since, in violation of the ordinance. The ordinance does not prohibit the crossing of such wires. It provides the remedy for it as an existing evil, and requires safeguards to be so placed as to avoid the danger to persons and property. It is not retroactive in any sense. First. The ordinance is reasonable, because it requires that to be done which in law and good conscience the defendant ought to do for the protection of the relator, whose established business it has endangered and disturbed. Second. It is clearly sustained under the police power of the city. "The test is whether it is designed and tends to protect some public or private right from the injurious act of the company; as when it prohibits the running of the cars of one company on any street so near the depot of another railroad as to interfere with safe and convenient access

to the latter road." Tied. Lim. 597-599. The statute of New York, requiring telegraph, telephone and electric wires to be placed underground in streets in certain cities (Chap. 499, Laws 1885) was upheld in *People v. Squire*, 107 N. Y. 593; 14 N. E. Rep. 820; *W. U. Tel. Co. v. Mayor, etc.*, 38 Fed. Rep. 552. The right and authority in a city "to regulate, control and prohibit the location, laying, use and management of telegraph, telephone and electric light and power 'wires and poles,' * * * in order to guard and secure the public safety and convenience," is upheld in *Wisconsin Tel. Co. v. City of Oshkosh*, 62 Wis. 32; 21 N. W. Rep. 828. Ordinance to regulate street railways is upheld in *State v. Madison St. Ry. Co.*, 72 Wis. 612; 40 N. W. Rep. 487, and in *State v. Hilbert*, 72 Wis. 184; 39 N. W. Rep. 326. Cities can regulate the placing of electric wires in the streets. *Keasbey Electric Wires*, 38; *Van Hook v. City of Selma*, 70 Ala. 361; *Mutual Union Tel. Co. v. City of Chicago*, 16 Fed. Rep. 309; *Delaware, L. & W. R. Co. v. East Orange*, 41 N. J. Law, 127; *W. U. Tel. Co. v. City of Philadelphia*, (Penn. Sup.) 12 Atl. Rep. 144; *Telegraph Co. v. Town of Harrison*, 31 N. J. Eq. 627; *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98; 11 Sup. Ct. Rep. 226. There can be no question, at this late day, but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the street, and require all reasonable safeguards for the same. The question is virtually so settled in this state by our own decisions.

The relator is entitled to sue out the writ of mandamus to compel the defendant to properly place such guard wires as the proper safeguard in such a case to protect its rights and safety. The relator is especially interested in the defendant's performance of this public duty. It is admitted to be true that such guard wires so placed are the very best and most approved method of safeguard in such case. This, then, is a clear legal right to be enforced by mandamus. *Marbury v. Madison*, 1 Cranch, 137; *Railroad Co. v. Hall*, 91 U. S. 343; *People v. Chicago & A. R. Co.*, 130 Ill. 175; 22 N. E. Rep. 857. There is no adequate remedy in such a case, except by the writ of mandamus, to compel the respondent company to do what it is

clearly right for it to do, and that the relator has the right to compel it to do. The penalty enforced would not cure the mischief. *Rex v. Barker*, 3 Burrows, 1266; *Scott & J. Tel.* § 78; *High Extr. Rem.* § 320; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Haines v. People*, 19 Ill. App. 354; *People v. Chicago & A. Ry. Co.*, 67 Ill. 118; *Ohio & M. Ry. Co. v. People*, 121 Ill. 483; 13 N. E. Rep. 236; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *State v. Demaree*, 80 Ind. 519; *Uniontown v. Com.*, 34 Penn. St. 293; *Howe v. Commissioners*, 47 Penn. St. 361; *Queen v. Trustees Luton Roads*, 1 Adol. & E. (N. S.) 860; *Cambridge v. Railroad Co.*, 7 Metc. (Mass.) 70; *Railroad Comrs. v. Portland & O. C. R. Co.*, 63 Maine, 269; *State v. Northeastern R. Co.*, 9 Rich. Law, 247; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *State v. Wilson*, 17 Wis. 687; *State v. Richter*, 37 Wis. 275; *State v. Supervisors of Wood Co.*, 41 Wis. 28; *State v. Chicago, M. & N. R. Co.*, 79 Wis. 259; 48 N. W. Rep. 243; *Overseers of Porter Tp. v. Overseers of Jersey Shore*, 82 Penn. St. 275. It is said that no such damages have yet accrued. The relation very clearly shows that such damage is imminent and threatening, and the danger is all the time present. This might be sufficient ground for an injunction to restrain the defendant from crossing the wires of the relator with its wires—a much more violent remedy. The relator does not seek to prohibit such crosses, but only to make them safe. The relator is conducting its telephone business under constant fear and apprehension. Must it wait until the full extent of the apprehended consequences have been realized? The remedy sought is clearly the proper one. The demurrer of the respondent to the relation, and the motion to quash the writ, should have been overruled. The order of the Circuit Court is reversed, and the cause remanded, with direction to overrule the demurrer and the motion to quash the writ, and for further proceedings according to law.*

Street railroads — municipal control and regulation.—The principal case presents a phase of the question of the public control of railways and the powers of municipal corporations over street railways. On the right of the legislative authorities to compel railroads to construct works and take precautions for the safety and welfare of the public, see *New York & N. E. R. Co. v. Town of Bristol*, post, and cases cited in note. As to the municipal regu-

* Reported in 57 N. W. Rep. 970.

lation and control of street railroads, see *South Covington & C. St. R. Co. v. Berry*, 6 Am. R. R. & Corp. Rep. 258, and note; *Sternberg v. State*, 7 Am. R. R. & Corp. Rep. 579, and note, and authorities in 4 Am. R. R. & Corp. Rep. foot of page 210.

DES MOINES CITY RY. CO. v. CITY OF DES MOINES ET AL.

(Supreme Court of Iowa, May 12, 1894.)

1. STREET RAILROADS. WHETHER OBLIGED TO REMOVE TRACK TO PERMIT CONSTRUCTION OF SEWER. A street railway company cannot be compelled by the city to tear up its track laid in the center of a street pursuant to an ordinance duly accepted, to permit the laying of a sewer under it, where it appears that the receipts of the company, which has expended large amounts in laying its track and making a safe roadbed there, would be greatly diminished, and public convenience interfered with, and the sewer can just as well be laid on one side of the track.

2. REMEDY TO PREVENT INTERFERENCE WITH TRACK FOR SUCH PURPOSE. Injunction will lie, at the instance of a street railway, to prevent a city and the city officers from unreasonably requiring it to tear up its tracks, the remedy at law not being adequate.

ACTION in equity to restrain the defendants from removing or otherwise interfering with part of the railway track of the plaintiff. There was a hearing on the merits, and a decree in favor of the defendants. The plaintiff appeals.

Guernsey & Baily, for appellant. *Hugh Brennan* and *J. E. Mershon*, for appellees.

ROBINSON, J. The plaintiff is a corporation organized and existing under the laws of this state, and owns, and is engaged in the business of operating, a system of street railways in the city of Des Moines. The system includes what is known as the "Eleventh and Twelfth Street Line," the "Clark Street Line" and the "Jefferson Street Line." The Clark street line is a prolongation of the Eleventh and Twelfth street line, and is a little more than two miles in length. The Jefferson street line is somewhat shorter. The portions of Des Moines reached by these lines contain a large number of people, many of whom depend upon the street railway for transportation to the business part of the city, and have no other convenient means of reaching it. The Eleventh and Twelfth street line extends on Twelfth street

from School street to University avenue—a distance of 2,552 feet—and is the part of the railway in controversy. It consists of a single track of two rails, placed in the center of the street, and has been in use for several years. In May, 1893, the city of Des Moines entered into a contract with Bryan & Youngerman for the construction of what is known as "Sewer No. 2," which included a pipe sewer in Twelfth street where the railway in controversy is located. The city claims the right to construct the sewer in the center of the street, and to compel the temporary removal of the track for that purpose. The defendants Finkbine and Chase, as the board of public works of the city, have notified the plaintiff to remove its track to permit the construction of the sewer, and the plaintiff seeks to prevent all interference with the track. The District Court dismissed the petition, and adjudged that plaintiff pay the costs of the action.

The plaintiff is the assignee and owner of the rights conferred upon the Des Moines Street Railway Company by an ordinance of the city of Des Moines passed in the year 1866, and of the railway system which has been constructed under that ordinance and the amendments thereto. Some questions arising under that ordinance were considered by this court in *Des Moines St. Ry. Co. v. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 515; 33 N. W. Rep. 619; 35 N. W. Rep. 602; S. C., 74 Iowa, 586; 38 N. W. Rep. 496. It was held in those cases, in effect, that the ordinance and its acceptance constituted a valid contract between the city and the street railway company. In securing the contract for building the sewer, the contractors believed it would be placed in the center of the street, and perhaps were authorized to act upon that belief, for the reason that most of the sewers of the city had been placed in the center of the streets through which they were constructed, and possibly for other reasons. The contract, however, did not specify in terms in what part of the street the sewer should be placed, excepting that it should be laid "according to the lines and grades furnished from time to time by the city engineer." The construction of sewer No. 2 was commenced by the contractor, and progressed to Eleventh street. The plaintiff had a line of railway in the center of that street, and, when it was reached by the contractor, the plaintiff was asked to remove the track to permit the building of the sewer in the center. It agreed

to do so on condition that the sewer on Twelfth street should be placed on one side of its track in that street. The proposition appears to have been assented to by the contractor and by Mr. Finkbine, of the board of public works. Thereupon the plaintiff caused to be prepared and submitted to the city council a resolution, of which the following is a copy: "Resolved, that hereafter, where pipe sewers are being put down in the several streets of the city of Des Moines where there is a single track for street railway purposes, such track being in the center of the street, the sewer shall be laid outside of the line of street railway, and on one side of the street; the side of the street to be determined by the board of public works." The resolution was adopted on the seventeenth day of July, and the plaintiff complied with its part of the agreement by removing its track in Eleventh street. The resolution was reconsidered on the twenty-second day of September, after this action was commenced.

It is said by the appellee that every franchise is accepted subject to the police power of the state, which cannot be bartered away, and the appellant assents to that proposition. But it is claimed that the demand made by the city is unreasonable, and, therefore, should not be enforced. It is well settled that a municipal ordinance or by-law, to be valid, "must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state, and that the courts may declare void ordinances and by-laws which are not reasonable. *Meyers v. Railroad Co.*, 57 Iowa, 557; 10 N. W. Rep. 896, and authorities therein cited; *Town of State Center v. Bar- enstine*, 66 Iowa, 249; 23 N. W. Rep. 652. See, also, *City of St. Louis v. Weber*, 44 Mo. 547; 1 Beach Pub. Corp. § 512; 1 Dill. Mun. Corp. §§ 319-322; *Ex parte Chin Yan*, 60 Cal. 82. An ordinance is unreasonable if it be partial, unfair or oppressive in its effects, as by imposing a serious burden without adequate cause. *Ibid.*; *Ex parte Frank*, 52 Cal. 606; *Harrisburg City Pass. Ry. Co. v. City of Harrisburg*, 149 Penn. St. 65; 24 Atl. Rep. 56. It is not shown that the sewer in question was located in the center of Twelfth street by ordinance; but, conceding that it was so located by action as formal and entitled to as much weight as an ordinance, we are required to determine whether that action was reasonable and valid. The ordinance of

the year 1866 required that all single tracks be laid in the center of the streets in all cases when it should be practicable to so lay them. The railway in question was constructed according to that requirement, and a large amount of labor and material has been used and much time spent in making a good roadbed. The cost to the plaintiff of removing its track to permit the construction of the sewer, and replacing it after the sewer is constructed, including the making of a good roadbed, would be about \$3,000. It would require years to make as good and safe a roadbed as the one now under the track, and the tearing up of the track would cause great inconvenience to patrons of the road, and would necessarily reduce the receipts of the plaintiff during the time that the sewer was being constructed. The reasons urged for placing the sewer in the center of the street are that nearly all of the sewers in the city are placed in the centers of streets, and those placed at the sides are few, and so placed for exceptional reasons; that the contract made for building the sewer required it to be located in the center of the street; that to change it to the side would cause great expense, delay and inconvenience; that the city has at all times required water pipes to be laid at one side of the streets, and gas pipes at the other, and that the property owners at one side of the street would be at greater expense than those on the other to connect with the sewer, if it is placed at the side. The evidence shows clearly that the sewer can be placed outside of the line of the railway without impairing, in any respect, the efficiency of the sewer system, and that sanitary considerations do not require that it be placed in the center of the street. If the sewer is placed at the side the increase of the cost in making a single connection between the sewer and the property on the side of the street furthest away would not exceed three dollars. Whether the contract for the sewer requires that it be located in the center of the street we need not determine, as the contract provides that any change in the plans or specifications shall not work a forfeiture, and that the difference in cost caused by the changes shall be determined by the engineer and board of public works on the basis of the contractor's bid. The evidence shows that the expense of constructing the sewer at the side of the street need not be materially, if any, greater

than to place it in the center. We are of the opinion that the reasons for placing it in the center of the street are not of sufficient importance to impose upon the plaintiff the burden of removing its track, and to expose the patrons of this line to the inconvenience and danger which would be caused by such a removal. In other words, we think the demand of the city is unreasonable. It is shown that, if the plaintiff will transfer its passengers at the point where the workmen engaged in constructing the sewer shall be at work, the cost of constructing it will not be materially increased, and the plaintiff avers its willingness to make such transfer. If required by the city it will be provided for in the decree. It is said the plaintiff has an adequate remedy at law, but we think not. It has a right to protect its track and roadbed by an action of this nature. The decree of the District Court is reversed.*

Street railways — rights as respects disturbance in consequence of street improvements. — The principal case is in accordance with the ruling of District Judge Hanford in *Clapp v. City of Spokane*, 53 Fed. Rep. 514; 7 Am. R. R. & Corp. Rep. 477, note 2. In *Milwaukee St. R. Co. v. Adlam*, 8 Am. R. R. & Corp. Rep. 320, it was held that contractors for paving a street would be enjoined from unnecessarily interfering with the running of cars. Gas and water companies are held to lay their pipes in streets subject to the right in the municipality to change the grade of the street or otherwise improve it, and if their pipes are exposed or injured thereby, they must bear the burden of repair. *Roanoke Gas Co. v. City of Roanoke*, 6 Am. R. R. & Corp. Rep. 88, and note; *Columbus Gas Light & Coke Co. v. City of Columbus*, 7 Am. R. R. & Corp. Rep. 472, and note. The same rule has been held to apply in the case of the construction of sewers in streets. *Portsmouth Gas Light Co. v. Shanahan*, 65 N. H. 238; 19 Atl. Rep. 1002; *National Water Works Co. v. City of Kansas*, 28 Fed. Rep. 921. Notes of these cases will be found in 6 Am. R. R. & Corp. Rep. 105, 106. So it has been held that a street railroad company must conform its track to the grade and improvement of the street. *City of Detroit v. Ft. Wayne & E. R. Co.*, 8 Am. R. R. & Corp. Rep. 188.

* Reported in 58 N. W. Rep. 906.

ELLIS v. BOSTON & L. R. Co.

(Supreme Judicial Court of Massachusetts, January 4, 1894.)

1. **ELECTRIC STREET RAILWAY. FRIGHTENED HORSE. DUTY OF MOTOR-MAN.** Where a motorman, while operating a street car, and sounding the gong, sees that the car and noise are frightening a horse, and thereby endangering the driver, it is his duty to do what he reasonably can to diminish the fright of the horse.

2. In such case the failure of the motorman to see the frightened condition of the horse, when he may see it by the exercise of reasonable care, is negligence.

ACTION for personal injuries by Alexander Ellis against the Boston and Lynn Railroad Company. Verdict and judgment for plaintiff. Defendant excepts.

A. A. Strout and John Warren Johnson, for plaintiff. Proctor, Tappan & Warren, for defendant.

KNOWLTON, J. Although there was some conflict of evidence in this case, the jury may have found that the plaintiff, having no reason to think it unsafe so to do, drove down a street in the city of Lynn on which was an electric railway, and there met one of the defendant's open electric cars, filled with passengers, on which the motorman was continually sounding the gong; that his horse was frightened at the car and at the noise of the motor and of the gong, and manifested his fear in such a way as to show the motorman that the plaintiff and his daughter, who was riding with him, were in great peril; and that the motorman, instead of stopping the car, or ceasing to sound the gong, kept on with the car and continued to make a loud clangor with the gong, so that the horse became unmanageable, broke the carriage, threw the plaintiff out, and thereby inflicted serious injuries upon him.

The defendant's requests for rulings go upon the theory that the manager of an electric railway car upon a street is never called upon to stop the car, or to change his method of managing it, to avoid any danger from the fright of horses other than the danger of collision with the car. These requests were founded on an erroneous view of the law. It is a well-known fact that

most horses are frightened at their first view of a moving electric car, especially if they encounter it in a quiet place, away from the distracting noises of a busy city street. It is only by careful training and a frequent repetition of the experience that they acquire courage to meet and pass such a car on a narrow street without excitement. The rights of the driver of a horse and the manager of an electric car, under such circumstances, are equal. Each may use the street, and each must use it with a reasonable regard for the safety and convenience of the other. The motor-man is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught, after a time, to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out, and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street, on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody. Of course, the owners and drivers of horses are required at the same time to use care in proportion to the danger to which they are exposed. *Benjamin v. Railway Co.*, (Mass.) 35 N. E. Rep. 95. These principles were adopted by the presiding justice for the guidance of the jury at the trial of this case, and the instructions given were correct. So far as the defendant's requests for instructions embody correct propositions of law, they were covered by the instructions given. The judge was not bound to tell the jury that certain facts, of which there was evidence, would or would not constitute negligence, apart from other facts, which were testified to.

The jury were rightly instructed to consider the question whether the motorman ought to have seen the frightened condition of the horse if he did not see it, and to treat his failure to see it, when he might have seen it by the exercise of due care, as negligence. There was ample evidence to warrant the verdict, and the bill of exceptions discloses no error in the proceedings. Exceptions overruled.*

* Reported in 35 N. E. Rep. 1127.

Cable and electric railroads — duty of motoneer in case of frightened horses — liability of company.— Where, in an action against a street car company for injury caused by a collision, defendant asks an instruction to the effect that, if plaintiff stopped his horse near the car, and the car then started with the horse in a position of safety, and the horse became unmanageable from having been scared by the ringing of the gong, and jumped in front of the car before it could be stopped, this would not be negligence, it is proper to modify the instruction by adding that if the horse was in a state of alarm, and the gong was rung violently, and so near to the horse as to produce greater alarm, and cause the accident, that might be negligence. *Philadelphia Traction Co. v. Lightcap*, (Ct. of App.) 61 Fed. Rep. 762.

In an action against an electric street railway company for injuries to a team frightened by one of defendant's cars, an instruction that if the car was running at high speed, and as soon as it came in sight the horses began to rear and jump, and the conductor saw, or ought to have seen, by the exercise of ordinary prudence, that the team was frightened, and in view of the width between the track and retaining wall, a man of ordinary prudence would have stopped the car, then the conductor was negligent in failing to stop it, is no error. *Gibbons v. Wilkesbarre & S. St. R. Co.*, 155 Penn. St. 279; 26 Atl. Rep. 417. In such action an instruction that, if the driver of the team was placed in a state of peril by the negligence of the person in charge of the car, defendant is responsible for the consequences that ensued, provided he exercised ordinary care, though the peril may have been increased by an effort made to avoid it, or though it might have been lessened or escaped by the exercise of unusual courage and self-possession, is not error. *Ibid.* It is not contributory negligence, as a matter of law, for a person to drive on a street occupied by an electric railway, even though the cars cause noise calculated to frighten horses, and the space between the track and the retaining wall is narrow. *Ibid.* See, also, *Steiner v. Philadelphia Traction Co.*, 2 Am. R. R. & Corp. Rep. 435; *Cornell v. Detroit Electric R. Co.*, 82 Mich. 495; 46 N. W. Rep. 791; 5 Am. R. R. & Corp. Rep. 45, note; *Central R. Co. v. Allmon*, 147 Ill. 471; 35 N. E. Rep. 725.

NEWARK PASSENGER RY. CO. v. BLOCK.

(Court of Errors and Appeals of New Jersey, December 5, 1893.)

1. **STREET RAILWAYS. SUIT FOR PERSONAL INJURIES. DIRECTING VERDICT.** When a trial judge is requested to nonsuit or direct a verdict in the trial of an action to enforce a liability for negligence, his duty is to determine whether facts have been established by evidence from which negligence may be reasonably inferred. If the real facts are in substantial dispute, the case cannot be taken from the jury.

2. **DUTY OF ONE CROSSING STREET UPON WHICH AN ELECTRIC RAILWAY IS OPERATED. CONTRIBUTORY NEGLIGENCE.** The rule requiring one exercising his lawful rights, in a place where the exercise of lawful rights by others may

put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed would endanger him. If obstacles temporarily intervene to prevent observation, he should wait until the required observation can be made.

3. RELATIVE RIGHTS OF ELECTRIC RAILWAY AND OF PEDESTRIANS IN STREET. SPEED OF CAR. Street cars propelled by electricity and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety.

FANNY BLOCK, the defendant in error, brought an action of tort against the Newark Passenger Railway Company, the plaintiff in error, in the Essex Circuit, to recover damages for an injury received from a car of the company running in a public street. After the evidence was all in, counsel for the railway company requested the judge to direct a verdict in its favor. The request was refused, and exception was taken. Other exceptions were taken to the charge, and to refusals to charge as requested. After judgment in favor of defendant in error, the cause was removed by writ of error to the Supreme Court, and error was assigned on the exceptions. The judgment was there affirmed.

Anthony Q. Keasbey and Edward Q. Keasbey, for plaintiff in error. *Louis Hood and Samuel Kalisch*, for defendant in error.

MAGIE, J. (*after stating the facts*). In support of the assignment of errors founded on the exception to the refusal of the trial judge to direct a verdict for plaintiff in error, it is insisted that the evidence (all of which is contained in the bill of exceptions, showed that there was no negligence on its part producing the injury for which the action was brought, but that there was negligence on the part of the defendant in error producing, or contributing to produce, her injury. In reviewing a judgment founded on a verdict directed by the trial judge after the whole evidence was in, this court declared that a jury should only be controlled in its verdict by a peremptory instruction when the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict in

opposition thereto, or, as the learned chancellor who delivered the opinion said: "To put it more forcibly and more accurately, if the evidence be such that the court would set aside any number of verdicts rendered against it, the jury may be controlled." *Crue v. Caldwell*, 52 N. J. Law, 215; 19 Atl. Rep. 188. This rule must furnish the test of the propriety of refusing a peremptory direction to find a verdict. It has been questioned elsewhere whether, in actions to enforce a liability arising from negligence, the trial judge can withdraw from the jury, by nonsuit or direction for a verdict, the question of negligence, which is a mixed question of law and fact. In this state the power of the trial judge to nonsuit has been exercised and approved for many years in a long line of cases too familiar to need to be referred to. The power to direct a verdict is identical with, and rests upon the same foundation as, the power to nonsuit. When in such cases the trial judge is requested to nonsuit or to direct a verdict, his duty is, as was well expressed by Lord Chancellor Cairns in *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to a jury; but if, from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence ought to be inferred. In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury. It follows that, if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judge must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury. *Moebus v. Becker*, 46 N. J. Law, 41; *Railroad Co. v. Shelton*, (N. J. Err. & App.) 26 Atl. Rep. 937. When this request was made it was obviously impossible for the trial judge to say what facts had been established. The evidence was contradictory to a degree unusual even in cases of this sort. It was impossible of reconciliation, and the real facts could only be determined by the jury settling the credit to be given to wit-

nesses and weighing and comparing their variant testimony. Under such circumstances it would have been error to withdraw the case from the jury.

The argument in behalf of the plaintiff in error is next addressed to an exception taken to the ruling of the trial judge upon a request to charge. To make the result intelligible it should be stated that the evidence of defendant in error in respect to the mode in which she received her injury was that she was struck and run over by a car of plaintiff in error, propelled by electricity, and running on the west-bound or north street car track in Springfield avenue in Newark; that when struck she was crossing the avenue from south to north on a crosswalk at the intersection of Prince street with the avenue; that an east-bound car running on the south street car track had stopped upon the crossing, and she had waited until it passed, when she went on, "looking both sides;" that, not seeing any west-bound car, she stepped on that track, and was immediately struck and run over. It appeared by the evidence of witnesses called by her that the east-bound car stopped at the crossing and went on, and the west-bound car passed it, running at great speed and without giving signals; one witness estimated the speed at fifteen miles an hour. The request in question was as follows: "If the jury believe the account of the plaintiff and her witnesses as to the fact that one car stopped at Prince street and passed the other below that street, it was the duty of plaintiff to wait long enough before crossing to allow the down car to pass far enough for her to see whether another was coming, and if she neglected that duty she was guilty of contributory negligence, and cannot recover, although the jury may believe that the up car was going at an unusual rate of speed — the track being straight, and the car visible far enough to avoid it at any possible speed." The judge declined to charge in that respect otherwise than he had charged, and this exception was taken. The request is open to criticism as asserting a fact respecting the distance at which a car was visible, which was in dispute. But it may be considered, however, as raising the question of the duty of the injured person under the circumstances above set out, and whether the request correctly states that duty.

It is first contended that the question of duty in this case is affected by the fact that defendant in error was crossing a high-

way along which cars propelled by electricity constantly ran. It is argued that the duty to take precaution against danger varies with the degree of peril; that the lawful use of a highway by such cars has, by reason of their running at greater speed, created additional danger to others using the highway, and that their duty in respect to such danger has thus been enhanced and enlarged. It is even insisted that the duty of persons traversing highways on which such cars run is like that imposed on persons passing along a highway where it is crossed at grade by a railroad operated by steam power. It is not pretended, and the case does not show, that plaintiff in error has acquired by legislative grant any right to run its cars in the highway at any rate of speed. Such a grant to use a rate of speed in highways which would be destructive of its customary use by others, and incompatible therewith, would not be within legislative competency, except on compensation made to the owners of the land traversed by the highway. Public highways have been acquired by dedication or condemnation for the use of the public in passing and repassing. Up to very recent times the public have used the rights of passing and repassing on highways, on foot or on horseback, or in vehicles drawn by horses or other animals. When authority was granted to lay rails on highways, and to run thereon cars drawn by horses for the carriage of passengers, it was long questioned whether such a use of the highway did not impose an additional burden upon the land, and whether such a grant could be made without compensation. It was finally settled by the weight of authority that the use of the highway by such cars was only a modification of the original use to which it had been devoted, and that no additional burden was imposed by such grant. That doctrine was adopted in this state. *Citizens' Coach Co. v. Camden H. R. Co.*, 33 N. J. Eq. 267. But it must be conceded that a grant of a right to use the highway in a mode incompatible with its customary use by the public would impose an additional burden, and could not be made without compensation. The public has acquired such rights in the use of highways as the owners of the lands traversed thereby have yielded or been deprived of, and it may not be restricted in the enjoyment of such rights by a use of the highway inconsistent and incom-

patible therewith, at least without legislative grant. Whether the public rights thus acquired may be thus diminished or destroyed by legislative grant when no compensation is made to landowners is not a question involved in this case, and no opinion is intended to be expressed thereon. As has been stated, no legislative grant in this case is shown. The contention of plaintiff in error rather takes this shape: It asserts that its cars, propelled by electricity, are capable of being run at greater speed than other vehicles in the highway, and that the public convenience demands, for passengers carried in such cars, what is called "rapid transit;" and it draws the inference that its cars may, therefore, be run at such speed as will satisfy this public demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. Judicial opinions have been cited to us which appear to support these extraordinary propositions. I am unable to subscribe to the notion which, carried to its logical conclusion, would permit this company, and other companies running cars in public highways propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand, undefined and unrecognized by law, to require. The right to use the highways by such cars is not paramount to the rights of others in the customary use thereof. It must be used in a manner consistent with such rights of others. Such a paramount right as is contended for could not, in my judgment, be granted without compensation, and it surely cannot be acquired from a vague notion of a public demand for rapid transit. There is no just analogy between the right of a street railway running such cars longitudinally along the highway and the right of a railroad company running its trains across a highway at grade. The latter company acquires by condemnation a right to run its tracks over the lands covered by the highway, and so burdens it with an additional easement. By legislative grant it uses the easement so acquired in the passage of trains run at great speed, and to a certain extent the public easement of passage is, at such crossings, modified. No grant for the acquisition and use of such additional easement has been made to the street railways, and in the absence of such grant no right to run cars at excessive rates of speed exists. Their only right in this respect is to run at such rate as will not interfere with

the customary use of the highway by others of the public with safety.

Let us now consider whether the request under consideration correctly states the duty of defendant in error under the circumstances supposed. The duty devolving on one using a highway for passage on foot varies with circumstances which are infinitely various. It may be of one degree when the highway is a quiet country road, and of another degree when it is the crowded street of a great city. It may differ at different hours of the day, with respect to different vehicles and the differing rates of speed at which they are moving, and by reason of different opportunities of observation. It is impossible, in my judgment, to classify these variant circumstances, and to lay down a precise rule as to the degree of care required in each class. In dealing with cases of this sort we must recur to the general rule which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances. From this rule it may be said, in general, that one who passes on foot along a sidewalk or footpath of a highway must use his powers of observation in respect to other passers thereon, and a reasonable judgment to avoid collision. In crossing the roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles, and a like judgment when and how to cross without collision. In the latter case, doubtless, the degree of care required exceeds that required in the former case, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed; it cannot be so quickly stopped or diverted from its course. A street car cannot deviate from its track, while the passer on foot may quickly stop, turn aside, or even retrace his steps. So, it may also be generally said that, if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made.

But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously

an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such a rule of duty were adopted and practiced in a crowded city, the crossing of many streets would be barred to pedestrians for a great part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety. Under this rule the defendant in error should doubtless have waited until she could have observed any west-bound car which, traveling at customary and reasonably safe speed, might imperil her in crossing, but she was not bound to delay until she could have seen any car on that track at any distance coming with excessive and dangerous speed. The charge was ample and correct on this subject, and the instruction asked for was properly refused.

The trial judge was further requested to charge that any one approaching a crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with the moving car, and "if, by looking, the plaintiff could have seen and so avoided an approaching car, she cannot recover." The request was not refused, but the trial judge said that he had "charged substantially according to his understanding of the law on that subject." An exception was then taken to the charge so far as it did not embrace "that secondary proposition." Such an exception does not draw into review an omission in the charge. If counsel conceived that a pertinent proposition of law had been omitted, he should have specifically requested the desired instruction and excepted to a refusal. If the proposition in question had been requested and refused, I think there would have been no error. It is a proposition applicable to the crossing of the highway by the lines of a steam railroad. It is inapplicable to the crossing of a street railway, the cars on which must not exceed such speed as will permit the lawful, customary use of the highway by others with reasonable safety. Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision; but, as has been shown, prudence does not require one crossing the track of a street railway to extend

his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing.

Other requests to charge, the judge declined to give otherwise than already given. The charge correctly stated the law in the particulars covered by these requests, and there was no error in declining to repeat, in other language, the doctrines already laid down as law.

The remaining exceptions are two portions of the charge which, it is urged, tended to improperly affect the jury. But the charge imposed on the jury, in the plainest terms, the duty of deciding the disputed questions of fact, and settling the inferences to be drawn therefrom. When that is done, comments, or even expressions of opinion, by the judge upon the evidence, are not open to exception. *Engle v. State*, 50 N. J. Law, 272; 13 Atl. Rep. 604, and cases cited. I may add that, if the rule were different, the language of the charge is not, in my opinion, open to any criticism of this sort. No error being found, the judgment below should be affirmed.*

1. Street railroads — relative rights and duties of the company and others in the use of the street and crossings.— A street car has no superior right of way as against a vehicle going along a street which crosses the street car track. *O'Neill v. Dry Dock, etc., R. Co.*, 129 N. Y. 125; 29 N. E. Rep. 84.

At a street crossing as high a degree of care is required of those in charge of an electric street car as of those driving other vehicles. *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551; 55 N. W. Rep. 742. A street railway car has no priority of way at a street crossing, with respect to other vehicles, and when the driver of such another vehicle, approaching the street railway track to cross it, sees a car approaching at such a distance, that he can apparently make the crossing safely, he has a right to attempt it, and it is not negligence per se in him to attempt it without looking a second time at the car. *Ibid.*

Upon much traveled streets in a city it is negligence to run an electric street railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of it not being on the lookout, nor having the car under control, nor using the proper means to stop it, so as to avoid a collision. *Ibid.*

One about to cross a street railway track is bound, on reaching the track, to look in both directions for an approaching car, and failure so to do is negligence per se. *Ehrisman v. East Harrisburg City Pass. R. Co.*, 150 Penn. St. 180; 24 Atl. Rep. 596.

* Reported in 27 Atl. Rep. 1067.

The granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the street railway company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property, or in the character of the motive power employed in propelling its cars. *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332; 55 N. W. Rep. 872.

2. Collision with vehicle crossing track — facts held to make a case for the jury.— In an action against a street car company for personal injuries caused by an electric car colliding with a heavy loaded wagon which plaintiff was driving across the tracks from one cross street to another, there was evidence that plaintiff saw the car nearly 400 feet away when he started to drive across; that it was daylight; that when he saw the car was getting close to him he "stirred up" his horses to get over the tracks; and that the driver of the car put on brakes only when the front of the car was about twenty feet from plaintiff. Held, that the question of due care by both parties was for the jury. *Driscoll v. West End St. R. Co.*, 159 Mass. 142; 34 N. E. Rep. 171.

3. Collision with vehicle standing between track and curb — negligence of company.— In an action against a street railroad company for personal injuries, plaintiff, the driver of a delivery wagon, testified that he drove his wagon close to the curb because he knew the street was so narrow as to render it difficult for cars to pass teams; that after making the delivery he noticed an approaching car, and went to the rear of the wagon to shut up the tailboard; that he signaled the motoneer to stop, and started to unhitch the horse to get him out of the way of the car; and that, while unhitching, the car struck the end of the wagon, frightening the horse, which turned around and injured plaintiff. Held, sufficient evidence of negligence on defendant's part to warrant the submission of the case to the jury. *Kestner v. Pittsburgh & B. Traction Co.*, 158 Penn. St. 422; 27 Atl. Rep. 1048.

4. Collision with vehicle — contributory negligence in obstructing track while unloading.— Where one, after dark, obstructs an electric street car track with his team while unloading his wagon, he is guilty of such negligence as will bar an action for the injuries to the team from a car, though it was more convenient to unload the wagon in that position than in any other. *Winter v. Federal St. & P. V. Pass. R. Co.*, 153 Penn. St. 26; 25 Atl. Rep. 1028.

5. Injury to pedestrian crossing track — contributory negligence — failure to look along track.— A person who is afflicted with deafness, and who wears a protruding apparel, obstructive of the sense of sight, and who ventures, without looking right or left, to cross a street railway track, acts rashly, and is guilty of contributory negligence, and cannot recover damages in case of an injury sustained by a collision with a coming mule and car. *Schulte v. New Orleans, etc., R. Co.*, 44 La. Ann. 509; 10 South. Rep. 811. To same effect: *Ehrisman v. East Harrisburg City Pass. R. Co.*, 150 Penn. St. 180; 24 Atl. Rep. 596.

The driver of a car has a right to assume that a woman about to cross the track is a person of sound hearing, and that she will exercise her senses, so as to avoid an accident, by stopping in time to let the mule and car pass freely. *Schulte v. New Orleans, etc., R. Co.*, 44 La. Ann. 509; 10 South. Rep. 811.

SMITH V. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, October 10, 1893.)

1. RAILROAD COMPANIES. AUTHORITY OF BRAKEMAN TO EJECT TRESPASSER. A brakeman has an implied authority to remove from his train, in a lawful manner, a trespasser found on a car platform.

2. EJECTING TRESPASSER WHILE TRAIN IN MOTION. LIABILITY OF COMPANY. Where a brakeman, in removing a trespasser, kicks him from the train while in rapid motion, the railroad company is liable for injuries caused thereby, the act being within the scope of the brakeman's employment.

James Andrew Scott and *Rufus K. Dinkle*, for appellant.
John W. Rodman, for appellee.

HAZELRIGG, J. The plaintiff, a minor, suing by his next friend, alleged that while he was riding on the defendant's car from Collins' Station to the city of Frankfort, and while the car was in rapid motion, "the defendant willfully, negligently and carelessly, by one of its agents and servants, to wit, a brakeman, kicked and threw" him off of its train, thereby breaking his arm and causing him other serious injury. The defendant denied these averments, and for a further defense alleged that the plaintiff secretly got on the rear end of one of its trains for the purpose of obtaining a free ride to Frankfort, and while so riding was discovered by its agent and servant, and thereupon voluntarily jumped off the car when in rapid motion, and whatever injury he received was caused by his own act. The plaintiff, who was seventeen years of age, and whose home was in Frankfort, testified that he had been working at Collins' Station, some two miles west of the city, and, becoming sick, had gotten on the train for the purpose of stealing a ride home. That he was sitting on the platform, with his feet on the steps, and was discovered by the brakeman, who demanded his fare, and, upon his not having either a ticket or any money, he was told that he must get off. He replied that he would if the train would stop. The brakeman then said: "I thought I told you to get off of here," and at the same time kicked him upon the hip, which broke loose his hold on the railing, and he fell headlong on the ground, becoming unconscious. The brakeman testified that when he discovered the plaintiff, and ascertained that he had neither a ticket nor money, he told him that he

must get off when the train got to the bridge, and that before he finished the sentence the plaintiff answered that he would get off now, and swung himself off in the cut, etc. He also testified, over the objection of the plaintiff, that "he had no authority from the conductor, or in any way, to put persons off the train," and that it was not his duty to do so, but that it was his duty to look after the comfort of the passengers, and to assist them in getting on and off at stations, and, in the absence of the conductor, to take up tickets and collect fares for the convenience of the conductor when he was engaged in other parts of the train; that if the plaintiff had paid him he would have handed it to the conductor, etc. The conductor testified that the brakeman had no authority to put any one off for non-payment of fare, and he gave him no such instruction. "It is his duty," testified the conductor, "to look after the safety and comfort of passengers, to assist them on and off the train, and to assist me in ejecting an unruly passenger or one who has no right to ride, and, when I am otherwise engaged, to collect tickets and fare, and give them to me," etc. Upon this state of case the court told the jury that if they believed from the evidence "that it was a part of the duty of the brakeman, under his employment as brakeman, to eject or put off of the train persons who failed or refused to pay their fare, and they shall further believe that the brakeman kicked plaintiff off the cars while in motion, or used unnecessary force in putting him off the car, they should find for the plaintiff such damages as he sustained thereby not exceeding \$10,000;" but that if they believed from the evidence "that the plaintiff jumped off the train, and was not kicked off by the defendant's employee, they should find for the defendant," and, lastly, that if they believed from the evidence "that the brakeman was not charged or required, as part of his duty under his employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant." The jury found for the defendant, and did so possibly because, without regard to the question of whether the brakeman kicked the plaintiff off the train, the proof submitted to them was conclusive that the brakeman had not been instructed to put persons off the train, and that such service was no part of his duty.

We are of opinion that the only question under the pleadings

and the proof, which should have been submitted to the jury, was whether the brakeman kicked the plaintiff from the train. It was admitted that the brakeman was an employee of the defendant, and that the train was in rapid motion when the plaintiff got off or was kicked off. Whether or not what the brakeman did was in the scope of his authority or in the line of his employment was a question of law, or of mixed law and fact, to be determined by the court alone from the proof, if, indeed, that were required, and from common observation and experience, from knowledge of the nature of the business, and the daily practices which obtain in its exercise. Now, we know it to be held universally that the conductor, using no unnecessary force, may remove from the car persons who refuse to pay their fare, or are drunk, riotous or unruly. It is an authority conceded to him — indeed, a duty required of him — and we would refuse to hear a railroad company's effort to plead or prove that it gave no such authority to its conductors, or did not charge them with such duties; and such, we believe, should be the rule with respect to brakemen. Even from the proof in this case, if we were to be so confined, we learn that he was to assist in the ejection of persons who had not the right to ride, and, upon the conductor's being engaged in another part of the train, he was to collect fares, and necessarily to enforce the regulations of the company to whatever extent the conductor might himself enforce them. We are so fully in accord with the view of the subject taken by the court in *Hoffman v. Railroad Co.* that we quote its language: "It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied, and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train concerned in its management, and fully cognizant of the obvious fact that intruders who jump upon the trains for a ride without intention of becoming passengers are wrongfully there. Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an

action against him for the assault that he was brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience. But, assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless and illegal. But the point is, was the act within the scope of the employment and authority? * * * In this case the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it." And the company was held responsible. 87 N. Y. 25. In this case the brakeman sought to collect the fare from the defendant, not for himself, but for the company. Upon his failure to pay, he sought to eject him from the car, not to accomplish his own ends, but to subserve the interests of the company. The company, it is true, owed the plaintiff no duty arising out of a contract to carry him or to protect him; nevertheless, it might not violate the common instincts of humanity, or treat the plaintiff brutally, in its process of ejecting him from the car. Undoubtedly, where the object of the servant — the end sought to be reached by him — is the intentional or malicious infliction of an injury upon the person of the trespasser, the company is not liable for his act, and the existence of malice or intentional and willful design is a question of fact to be ascertained from all the circumstances of the case. If the end sought by the employees was the infliction of an injury — if the purpose he had in view when he kicked the plaintiff off the train, if he did kick him off, was to injure him — then the company is not liable, because the act would be malicious and willful. But if the end sought was the ejection of the intruder — if his purpose was devoid of evil design and merely to protect the interest of his employer — then, however careless or reckless the means employed, the company is liable. The case cited by counsel for

the appellee, and said to be directly in point, illustrates the distinction. The plaintiff, a boy and a trespasser, was driven off the train by a brakeman, who threw coal at him so as to cut and blind him, and cause him to slip and fall on the track, whereby he was injured. The company was held not to be liable. *Coal Co. v. Heeman*, 86 Penn. St. 418. So, this court, in the case of *Winnegar's Admr. v. Central Pass. Ry. Co.*, 85 Ky. 547; 4 S.W. Rep. 237, said: "If one driving the cars for the corporation should leave the car and beat or abuse one on the sidewalk, the company would not be responsible." The principle involved and stated by this court in *Sherley v. Billings*, 8 Bush, 147, in this language, that "if the servant goes beyond the scope of his employment he is as much a stranger to his master as to any third person and his acts can in no sense be regarded as the acts of his master," is easy of announcement but sometimes difficult of application. In all cases where unnecessary force is used it may be said that the servant acted without authority, express or implied. It can truthfully be claimed in all cases, and by all companies, that the authority of their servants is limited to the exercise only of force sufficient to eject a trespasser or passenger in a lawful manner. Nevertheless, the company is liable if the servant in the exercise of his authority, within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances or at a time when the consequences ordinarily would be seriously injurious to the person ejected. In this case it does not matter that the act of ejection is charged in the petition as having been done willfully as well as negligently and carelessly. The willfulness is charged against the defendant company, and for this reason it cannot be said that the use of the term "willful" in itself shows the act to have been malicious on the servant's part, and, therefore, beyond the scope of his authority. The servant is not charged with committing the act willfully, but the company is charged to have willfully done it by its agent and servant.

The allegation of the answer that the plaintiff voluntarily swung himself off the train is not such an affirmative averment as required a reply. The simple issue was presented whether or not the brakeman kicked him off. The statement that he swung himself off is merely in emphasis of the denial that he was kicked

off. It is mere surplusage, and at any rate is in direct conflict with the averment of the petition that the plaintiff was kicked off, and is in substance a denial of that averment. We are of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off of the car, as testified to by the plaintiff, and whether he did so with or without malice or evil design, as indicated above; and upon the determination of these issues depends the question of the company's responsibility for the plaintiff's injury. Judgment reversed, with directions to proceed as indicated by this opinion.*

1. Railroad companies—liability for act of brakeman in ejecting trespasser—authority of brakeman.—In *Corcoran v. Concord & M. R. Co.*, (Circ. Ct. of App.) 56 Fed. Rep. 1014, it was held that the mere fact that a trespasser riding upon a freight train is thrown from the top of a car while the same is in rapid motion, by a person carrying a lantern, whom he supposes to be a brakeman, is not sufficient to show a liability on the company's part for resulting injuries, when there is no evidence as to the alleged brakeman's authority. The trial court directed a verdict for the defendant. This was affirmed for the simple reason that no evidence was given showing the brakeman's authority. The court in effect holds, therefore, that a brakeman has no presumptive authority to remove trespassers.

So, where it appeared that a boy was forcibly removed from a freight train by some employee of the company, whose name and position were unknown, and there was no evidence to show that such employee was acting in the scope of his employment or duty, it was held that a verdict in favor of the boy for injuries sustained must be set aside. *Bess v. Chesapeake & O. R. Co.*, 35 W. Va. 492; 14 S. E. Rep. 234.

The question is well considered and the authorities reviewed in *Farber v. Missouri Pac. Ry. Co.*, 116 Mo. 81; 22 S. W. Rep. 631, in which the plaintiff, a trespasser, was injured by being forcibly ejected from a freight train by a brakeman. The court says: "It being, then, an uncontroverted fact that plaintiff was wrongfully, and without any lawful right whatever on the train, the liability of the defendant to him for an injury he may have received is not founded upon the duty and obligations imposed by law on common carriers, but is referable to the law of agency. It was said in *Snyder v. Railroad Co.*, 60 Mo. 413, that 'it is firmly established in this state that the master is civilly liable for the tortious acts of his servants, whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the course of his employment, even though the master did not authorize or know of such acts, or may have disapproved or forbidden them.' *Garretzen v. Duenckel*, 50 Mo. 107. Indeed, the doctrine of the old cases, as announced in *McManus v. Crickett*, 1 East, 106, no longer obtains in the courts of this state. The liability of the master for the acts of the servant rests now upon the condition whether or not the act of the servant was in the course of his employment.

* Reported in 23 S. W. Rep. 652.

Perkins v. Railroad Co., 55 Mo. 201; *Craker v. Railroad Co.*, 36 Wis. 657. This test must determine this case. It is assumed by plaintiff that this court should take judicial notice that it was within the line of the brakeman's employment to put trespassers off of the train from which he was expelled, and the defendant is necessarily liable for the reckless performance of this duty by the brakeman. The learned counsel cites us to no well-considered case in which such a presumption is indulged. In *McGowan v. Railroad Co.*, 61 Mo. 528, Judge Hough, in discussing whether certain employees were fellow-servants, said: 'This court cannot take judicial notice of the duties required of, or performed by, such servants, nor of the degrees of supremacy or subordination existing among them.' On the contrary, in *Wood's Railway Law* (§ 316), it is said 'the conductor of a train, being in charge of it, and having full control of it, for the time, represents the company as to any matter connected with its management and control, and for an act done by him in the line of his duty, as by the ejection of a trespasser from the train, etc., the company would unquestionably be liable; but for the act of a brakeman of the train, who, without the direction of the conductor, should remove a trespasser from the train, the company would not be liable, unless express authority to do an act, to which the act complained of is incident, is shown, because the act is not one which comes within the scope of his duty.' *Farber v. Railway Co.*, 32 Mo. App. 381; *Bess v. Railway Co.*, 35 W. Va. 492; 14 S. E. Rep. 234. The authorities cited by Wood support his text. *Marion v. Railroad Co.*, 59 Iowa, 428; 13 N. W. Rep. 415; *Peck v. Railroad Co.*, 70 N. Y. 587; *Rounds v. Railroad Co.*, 64 N. Y. 129; *Walker v. Railway*, 23 L. T. 14. We think that the powers and duty of the brakeman were a matter of fact, to be determined by evidence, and we are not justified in taking ex officio notice of their extent or character. Moreover, there is no reason for assuming, in the absence of proof, that the brakeman on a freight train has been clothed with the power to remove persons who shall endeavor to take passage on the train. It was not to be presumed that any one would violate the law, and attempt to ride, in the first place, and hence require his services for such purpose; nor that this subordinate would be so invested, when he had a superior present in person of the conductor, upon whom such duties usually devolve. *Railroad Co. v. Anderson*, 82 Tex. 516; 17 S. W. Rep. 1039. Having reached this conclusion, it must be apparent that there was no evidence whatever tending to show that the brakeman was employed, either generally or specially, to remove passengers from the train. Had he been shown to have such authority, and had he exercised it in the cruel and unjustifiable manner charged by plaintiff, no doubt would be entertained as to the company's liability. *Brill v. Eddy*, 115 Mo. 296; 22 S. W. Rep. 488. But the mere fact that plaintiff was injured by the tortious act of the brakeman while he was in the employ of defendant cannot render defendant liable. The wrong perpetrated must pertain to the particular duty of the brakeman; in other words, the act must be within the scope of his employment; and this the evidence failed to show. *Stringer v. Railway Co.*, 96 Mo. 299; 9 S. W. Rep. 905; *Sherman v. Railway Co.*, 72 Mo. 63-66; *Flower v. Railway Co.*, 69 Penn. St. 210; *Coal Co. v. Heeman*, 86 Penn. St. 418; *Marion v. Railroad Co.*, 59 Iowa, 428; 13 N. W. Rep. 415."

It was also held in the same case that it is not competent to prove the duties of a brakeman by the testimony of one who has only been round trains a few times, when the brakemen had been attending to their business, and who testified that he had no other knowledge of their duties than what he had observed, and what he had been told by railroad men that they were supposed to be.

2. Causing trespasser to jump from moving train by threats — liability of company.— Plaintiff was sitting on a box car, which was standing in defendant's yard. An engine was attached to the car without his observing it, and the train was moved away. A person came to plaintiff and ordered him to leave the train, using violent and threatening language, in consequence of which plaintiff leaped from the car while it was in rapid motion and was injured. The court instructed that if defendant's servant, within the scope of his employment, by peremptory order and threats, caused plaintiff to get off the car when it was dangerous to do so, defendant was liable. Held, correct. *Gulf, etc., R. Co. v. Kirkbride*, 79 Tex. 457; 15 S. W. Rep. 495.

3. Ejecting trespasser from moving train, when not negligence.— Removing a trespasser from a train of cars while the train is in motion, when the train is moving very slowly, is not negligence or wantonness per se. *Southern Kansas Ry. Co. v. Sanford*, 45 Kans. 372; 25 Pac. Rep. 891.

BRADFORD v. BOSTON & M. R. R. Co.

(Supreme Judicial Court of Massachusetts, Worcester, January 6, 1894.)

1. RAILROAD COMPANIES. RIGHT TO BE ON DEPOT GROUNDS. A person who, being temporarily in town, goes to the depot for a time table to see if there are any changes therein, is not a trespasser on the company's walk leading to the platform.

2. INJURY TO ONE BY MAIL BAGS THROWN FROM CAR. CONTRIBUTORY NEGLIGENCE. A woman who does not know that passing express trains throw off mail bags on a walk leading to the depot is not, as a matter of law, negligent in walking along the middle of said walk without looking or listening for trains, the walk being nine feet wide and its edge two and one-half feet from the nearest track.

ACTION by Abbie S. Bradford against the Boston and Maine Railroad Company for damages for personal injuries. Verdict directed for defendant. Plaintiff excepts.

W. S. B. Hopkins, Frank B. Smith and Chas. G. Bancroft, for plaintiff. *Frank P. Goulding*, for defendant.

FIELD, Ch. J. The exceptions state that at the close of the evidence "the defendant requested the court to direct the verdict

for it, on the grounds that there was no evidence of the plaintiff's due care or of the defendant's negligence; and the court ruled, upon this evidence, that the plaintiff was not in the exercise of due care, and was not entitled to recover, and directed a verdict for the defendant." The court apparently was of the opinion that there was no evidence for the jury that the defendant was negligent in permitting mail bags to be thrown from a rapidly moving train onto the platform, where passengers or other persons might be standing or traveling. This is in accordance with the decision in *Snow v. Railroad Co.*, 136 Mass. 552. In that case "the plaintiff was a passenger on the railroad of the defendant, and properly on the platform at the station, waiting to make a necessary change from one train to another. There is no claim that she was in an improper place, or in any way wanting in due care." The contention in the present case is that the plaintiff was in an improper place, and was wanting in due care, and that she was either a trespasser or licensee, and that the defendant owed her no duty to be careful in the management of its trains. We think there was evidence that the platform was constructed and maintained by the defendant as a passageway to and from its station, with which it was connected; and that persons having business to be transacted at the station were invited to use this platform as a passageway necessary or convenient in going to and from the station.

The plaintiff "testified that she was staying temporarily in Lancaster, her residence being in Boston; * * * that at the time of the accident she was boarding at the hotel; that on the 22d of June, 1891, at a little after nine o'clock in the morning, she left the hotel, passing her sister's house, where she stopped, and then went to the railroad station, for the purpose of getting a time table, and to see if there was any change in the time of the running of trains." From this the jury might infer that she was properly going to the station, on business connected with the railroad, and that the platform was intended to be used by her in going to and from the station on such business, if she found it convenient. She also testified "that she went onto the long platform about half way between the sidewalk and the station itself; * * * that she walked along the platform as any one would walk, perhaps half way from the outer edge, perhaps a

little outside of the middle of the platform; that she had an umbrella in her hand, but could not remember whether it was up; that it had been sprinkling a little; that she didn't look to see if any trains were coming; that she did not listen to hear if any were coming; that, if she had known an express train was coming at the rate of thirty-five miles an hour, she would have walked on the platform as she did; * * * that the platform was a reasonably wide platform; that it was reasonably wide between her and the train." There was testimony that the east edge of the platform was two and one-half feet from the nearest track, and that the platform from the station to the sidewalk was about nine feet wide, and that the platform in front of the station was thirteen and one-half feet wide. We think that the evidence tends to show that she was somewhere on the platform, which was about nine feet wide, and that she was not nearer to the track than the middle of the platform. We cannot say, as matter of law, that this was not a safe position, so far as any danger might be apprehended from the passage of an express train. See *Rigg v. Railroad Co.*, 158 Mass. 309; 33 N. E. Rep. 512. One contention of the defendant is that she was negligent in not looking or listening for the approach of a train, and in not getting out of the way. But we cannot say, as matter of law, that her position was such that she had reasonable cause to believe that she was in any danger if a train did pass, and, if so, she was not necessarily negligent in not looking or listening for a train. We do not know that the plaintiff would have been injured by the passing of the train if a mail bag had not been thrown from it. She testified "that she did not know that mail bags were thrown off at that point." She perhaps had a right to presume that, if this platform was a passageway intended by the railroad company to be used by passengers and other persons in going to and from the station, the company would take care that missiles should not be thrown upon it from passing trains, to the injury of persons lawfully upon it. Whether there was not evidence for the jury that the throwing of a mail bag from a passing train upon the platform under the circumstances proved showed reckless conduct, for the consequences of which the railroad company would be liable to any person on the platform by the license of the company, is a question we have

not considered. There was evidence for the jury, we think, that the plaintiff was properly on the platform, by the implied invitation of the defendant, and that she was in the exercise of due care. *Carpenter v. Railroad Co.*, 97 N. Y. 494. See *Railroad Co. v. Maine*, 67 Ill. 298. Exceptions sustained.*

Railroad companies—injury to person on platform by mail bag thrown from car—liability of company.—In *Galloway v. Chicago, M. & St. P. R. Co.*, (Minn.) 57 N. W. Rep. 1058, the plaintiff, while lawfully walking along a depot platform, was struck and injured by a mail bag, as it was thrown from the postal car by a United States mail agent. As to liability of the railroad company the court laid down the following rule: While a railway company has no right to interfere with a United States mail agent in the discharge of his official duties, yet it has the right, and it is its duty, to prevent him, while on its trains, from continuing any dangerous practice, of which it has notice, which is liable to cause injury to passengers and others lawfully on its premises; and, if the practice is one from which such injury might be reasonably anticipated, it is not necessary, in order to charge the company with this duty, that on some former occasion a like injury had occurred. And in the opinion it is said: "Inasmuch as the mail agent was not the servant of the defendant, it is not claimed that the railway company would be liable for his negligence, however gross, on this occasion only. To render it liable, as negligent, for the negligence of the mail agent, this government employee must have practiced a dangerous method of discharging mail sacks on the platform at this station so habitually, or so frequently, as to charge the company, as part of its duty to its passengers and others occupying its depot platform by its invitation or license, with notice, actual or implied, of his negligence or recklessness. While the railway company had no power to interfere with the mail agent in the discharge of his official duties, yet it was its right, as well as duty, to prevent him, while on its cars and on its premises, from continuing any negligent practice, of which it had notice, which was liable to cause injury to passengers and others lawfully there. The case comes fully within the rule which enjoins care, not only on the part of the company's servant, but also like care in preventing injury from the wrongful act of others whom it permits to come upon its premises." A verdict for the plaintiff was sustained.

To the same effect are the cases of *Snow v. Fitchburg R. Co.*, 136 Mass. 552, and *Carpenter v. Boston & A. R. Co.*, 97 N. Y. 494, which were suits for personal injuries received in precisely the same way.

In the case of *Muster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325; 21 N. W. Rep. 325, it appeared that the plaintiff was at work upon a staging at one of the stations of defendant. A mail bag was thrown from a passing train so as to strike one of the supports, causing the staging to fall and injure the plaintiff. The mail bag was usually thrown off about 200 feet west of the depot, and there was no evidence of it ever having been thrown off at the depot

* Reported in 35 N. E. Rep. 1131.

before. It was held that the railroad company was in no way responsible for the acts of the mail agent ; that it was not negligent in not notifying plaintiff of the possibility of a mail bag being thrown off at the depot, or in running its train past the station at a speed of thirty to thirty-five miles per hour. The court says : " We do not understand counsel as claiming that the railway company is liable for the negligent act of the postal employee, if it is otherwise free of negligence contributing to the injury of the plaintiff. Such a claim, if made, could not be sustained. The government compels the company to carry the mails, and designates the trains upon which the same shall be carried. It prescribes the kind of cars which shall be provided, and appoints clerks and agents to take exclusive charge of mails on the trains, and to receive and discharge the same. Such clerks and agents are paid by the government, and are answerable only to the government for the manner in which they discharge their duties. The railway companies upon whose trains such duties are performed have no control whatever over them, and it would be just as absurd to hold one of these companies responsible for the negligent acts of such government employees, which it had no means of preventing, as to hold the companies responsible for the negligent acts of passengers on their trains, committed under like circumstances. We conclude that the mere act of the postal employee in throwing off the mail bag at the depot, conceding it to have been a negligent act, was not negligence on the part of the railway company."

ABRAMS V. MILWAUKEE, L. S. & W. RY. CO.

(Supreme Court of Wisconsin, April 10, 1894.)

1. COMMON CARRIERS. LIMITING LIABILITY FOR NEGLIGENCE. A stipulation in a contract for the shipment of live stock, that the carrier shall not be liable for injuries to the stock, though caused by the negligence of its servants, is void, and hence does not prevent liability on the part of the company for injury to the stock caused by the neglect or refusal of the train servants to allow the person in charge of the stock an opportunity to feed and water them for the space of thirty-four hours.

2. LIMITING LIABILITY TO A SPECIFIED SUM. In the absence of an agreed valuation, a contract for transportation of horses by a railroad company, providing " that the liability of the company shall not, in any event, exceed one hundred dollars per head " for damages resulting from its negligence, is void.

ACTION by Robert E. Abrams against the Milwaukee, Lake Shore and Western Railway Company for damages resulting from its negligence in the shipment of horses. Plaintiff had a verdict for \$650 for the loss of three horses, upon which the court refused to enter judgment, holding that the clause in the shipping contract providing that the company should not be liable for

more than \$100 per head was valid, and ordered judgment for \$300 in favor of plaintiff. From this judgment both parties appeal. Judgment as to plaintiff reversed, and remanded with instructions to enter judgment for the full amount, and affirmed as to defendant.

It appears from the record that March 31, 1890, the plaintiff and one Richard Abrams were each the owners of four several horses at Harrison, Lincoln county, Wis., and shipped the same upon the cars of the defendant from that station to Oshkosh. That at the time of said shipment the agent of the plaintiff and said Richard Abrams entered into a written agreement respecting said shipment, of which the following is a copy, to wit: "Harrison Station, March 31, 1890. Received from Joe Phelan, consigned to G. W. Pratt, Oshkosh, live stock described as follows, viz.: Horses in M., L. S. & W. car number 3,204, to be delivered at Oshkosh at the following rates, viz. tariff. In consideration of which, and of other valuable considerations, it is hereby mutually agreed between the Milwaukee, Lake Shore & Western Railway Company and the shipper of said live stock that the said company shall not be liable for any loss or damage or injury to said live stock from any cause whatever, whether by negligence of its agents or employees or otherwise, except such as may result from a collision of the train, or from cars being thrown from the track in course of transportation; and it is further agreed that the owner shall load, unload, feed, water and take care of said stock at his own expense and risk, and that he assumes all risk of injury or damage that the animals may in any way or manner or from any cause sustain, except as above provided. It is further agreed that the liability of the company shall not, in any event, exceed one hundred dollars per head, and that all persons passed free to accompany and care for the stock will assume all risk of personal injury from any cause whatever, whether by negligence of the agents or employees or otherwise. Milwaukee, Lake Shore and Western Ry. Co., by F. J. Gruber, Agent. Jos. Phelan, Shipper. Agents will note instructions on back hereof." Indorsement on back: "M., L. S. & W. Ry. Co. Live stock contract. From Harrison to Oshkosh. Nos. of cars, M., L. S. & W. 3,204. I hereby certify that I am actually in charge of the live stock described within, and in consideration that the M.,

L. S. & W. Ry. Co. transports me free on the same train with the stock, I hereby assume all risk of personal injury from any cause whatever. Rob't Lyness." "I hereby certify that the above named are actually in charge of the live stock described within, and are entitled to pass on same train with it under conditions named. F. J. Gruber, Agent, Harrison Station." That, November 24, 1891, the plaintiff commenced this action, alleging, in effect, the incorporation and organization of the defendant, the making of such contract of shipment and the payment of fifteen dollars in consideration thereof; that the defendant delayed the transportation of said horses for a period of five hours or more after arrival at Antigo, and that the defendant so negligently and carelessly conducted and mismanaged in respect to the carrying of said horses and its duty and calling as a common carrier that it neglected and failed to give the plaintiff's servant in charge of said horses an opportunity to unload and feed the same, though requested so to do by said servant, and by reason thereof the said horses suffered for want of care and food, and became weak and faint; that said eight horses were transported in the same car with eight other horses; that by reason of their faintness and weakness, so caused, they were unable to retain their standing or proper posture in said car, and were forced into cramped positions and attitudes, and thrown down, so as to necessitate their being twice unloaded during the transportation — once at Elmhurst, and once at Eland Junction, on the line of the defendant's road; that when so unloaded the defendant refused, failed and neglected to give said servant in charge an opportunity to feed and properly care for said horses while they were so unloaded, but immediately caused the same to be reloaded; that, in consequence of the defendant's careless and negligent conduct, three of said horses became sick and diseased, and died of the effects of said exposure and said want of care and protection; that two of them were the property of the said Richard Abrams, and the other the property of this plaintiff; that the loss of said horses was to the damage of the plaintiff and the said Richard Abrams in the sum of \$650; that afterwards, and before the commencement of this action, the said Richard Abrams, for a valuable consideration, duly sold and assigned to the plaintiff all his interest, claim and demand against

the defendant on account of the loss and death of said horses as aforesaid, and that the plaintiff is now the sole owner thereof; and demanded judgment in the sum of \$700, with costs and disbursements. The defendant answered by way of denials and admissions, and justified under said written contract. At the close of the trial the jury returned a special verdict to the effect (1) that the loss or death of the plaintiff's said horses was caused by the negligence of the defendant or its employees; (2) that the value of each of two of said horses was \$200 each, and the other was \$250. That the court thereupon denied the motion of the defendant to set aside the verdict and grant a new trial; that the court thereupon denied the motion of the plaintiff for judgment upon and in accordance with the special verdict for the whole amount thereof, with costs, but ordered judgment upon the special verdict to be entered in favor of the plaintiff and against the defendant in the sum of \$300 and costs and interest from the commencement of this suit; that judgment was thereupon duly entered accordingly, from which both parties appeal.

Felker, Stewart & Felker, for plaintiff. *A. L. Cary* and *B. G. Schley*, for defendant.

CASSODAY, J. (*after stating the facts*). The jury found as a matter of fact, in effect, that the horses came to their death by reason of the negligence of the defendant. The horses were transported on the defendant's car for a distance of about 140 miles, and the time occupied by such transportation was about thirty-four hours. During that time the horses had no food nor drink. According to the testimony of those in charge of the horses, the defendant refused to give them any opportunity to take the horses from the car and give them food and drink, though repeatedly requested so to do; that this was particularly so at Antigo, where the car remained about eight hours; that it was also true at other places; and that there were eight other horses in the same car, and it was impracticable to give them food and water without removing them from the car. It appears that the train reached Oshkosh about six hours behind schedule time. There is expert testimony to the effect that such exposure of the horses without food or drink probably induced the disease

which caused their death. We must assume, therefore, that the evidence supports the verdict to the effect that the horses came to their death by reason of the negligence of the defendant. The defense relied upon is that, by the written contract of shipment contained in the foregoing statement, the defendant was expressly exempted from all liability by reason of such negligence, and that the plaintiff thereby assumed all risk of such injury or damage. Such is, indeed, the contract, if we are to give literal effect to its language. In *Betts v. Trust Co.*, 21 Wis. 80, it was said by Dixon, Ch. J., in speaking of the transportation of live stock, that, "as to this species of property, we think it competent for the carrier to contract that the owner shall assume all risk of damage or injury from whatever cause happening in the course of transportation." This proposition covers more ground than the point actually decided in that case, but seems to be sustained by the earlier English cases, while the later English cases seem to hold a contrary doctrine. See *Richardson v. Railway Co.*, 61 Wis. 598, 599; 21 N. W. Rep. 49, and cases there cited. In *Morrison v. Construction Co.*, 44 Wis. 410, the only question involved, as stated by the present chief justice, was whether the company "was guilty of any negligence, carelessness or fault which caused or produced the injury to the property of the plaintiff," and he concluded by saying: "From all that appears in the evidence, it was a mere accident, and unaccountable." *Richardson v. Railway Co.*, supra, was an action to recover damages for delay in furnishing cars for the transportation of hogs. It was there pretty strongly intimated, if not directly held, that a railway company was not under the same obligations to furnish cars for and receive, safely carry and store live stock, as other ordinary inanimate freight, but that it might, to at least a certain extent, exact conditions upon such receipt, and limitations upon such liability. In that case the complaint was held bad on demurrer for failure to allege the customary terms or conditions and restrictions upon which the company was in the habit of receiving and shipping such live stock, or the requisite facts to create a liability under section 1798, Revised Statutes. In *Ayres v. Railway Co.*, 71 Wis. 372; 37 N. W. Rep. 432, it was held that "a railroad company engaged in the business of transporting live stock, and accustomed to furnish suitable cars therefor upon

reasonable notice, whenever it can do so, and which holds itself out to the public as such carrier for hire, upon the terms and conditions prescribed in a special written contract with shippers, is a common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arise from the instincts, habits, propensities, wants, necessities, vices or locomotion of such animals under the contracts of carriage." Within the rule thus suggested it was competent for this railroad company to stipulate with the owners of live stock that they should load, unload, feed, water and take care of the stock at their own expense. The contract in question contains such a stipulation. But the stipulation itself raised an implied obligation on the part of the defendant to furnish to such owners the requisite opportunities for so loading, unloading, feeding, watering and taking care of such stock. This action is to recover damages for willfully refusing or negligently omitting to perform that duty. The question recurs whether the defendant, by the contract of shipment, could lawfully exempt itself from liability for such negligence. This court has held that a common carrier of persons or property cannot by any agreement, however plain and explicit, wholly relieve itself from liability for injury resulting from its gross negligence or fraud. *Black v. Transportation Co.*, 55 Wis. 319; 13 N. W. Rep. 244; *Lawson v. Railroad Co.*, 64 Wis. 455; 24 N. W. Rep. 618. The same rule has been applied to a passenger carried gratuitously by a railroad upon a pass containing such a stipulation. *Annas v. Railroad Co.*, 67 Wis. 46; 30 N. W. Rep. 282. So this court has repeatedly held that a telegraph company cannot, by such stipulation, relieve itself from liability for damages happening by the want of ordinary care of itself or servants. *Thompson v. Telegraph Co.*, 64 Wis. 531; 25 N. W. Rep. 789; *Hibbard v. Same*, 33 Wis. 558; *Candee v. Same*, 34 Wis. 471. In the leading case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 384, Mr. Justice Bradley discussed the subject with his accustomed learning and ability, and he and the whole court reached the conclusions: "(1) That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; (2) that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from

responsibility for the negligence of himself or his servants; (3) that these rules apply both to common carriers of goods and common carriers of passengers for hire, and with special force to the latter; (4) that a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire." In reaching such conclusions Mr. Justice Bradley said: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence, the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. * * * It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment; and to assert that he may do so seems almost a contradiction of terms." Ibid. 377, 378. Accordingly, it was there held, in effect, that the railroad company could not abdicate the essential duties of its employment of carefulness and fidelity as such common carrier. The doctrine of that case has frequently been sanctioned by the same court. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 442; 9 Sup. Ct. Rep. 469, and cases there cited. There are numerous adjudications in the state courts to the same effect. *Grogan v. Express Co.*, 114 Penn. St. 523; 7 Atl. Rep. 134; *Buck v. Railroad Co.*, 150 Penn. St. 170; 24 Atl. Rep. 678; *Lindsley v. Railway Co.*, 36 Minn. 539; 33 N. W. Rep. 7; *Hull v. Railway Co.*, 41 Minn. 510; 43 N. W. Rep. 391; *Boehl v. Railway Co.*, 44 Minn. 191; 46 N. W. Rep. 333; *Canfield v. Railroad Co.*, 93 N. Y. 532; *Railroad Co. v. Witty*, 32 Neb. 275; 49 N. W. Rep. 183; *Railway Co. v. Wynn*, 88 Tenn. 320; 14 S. W. Rep. 311; *McFadden v. Railway Co.*, 72 Mo. 343; 4 S. W. Rep. 689; *Galt v. Express Co.*, 48 Am. Rep. 742. Some of these cases involved the validity of such stipulation for exemption of liability in contracts for the carriage of live stock, and, while they indicate that such contract for exemption might be made as against injuries resulting from the inherent nature or propensities of the animals without fault of the

carrier, yet they all hold that the carrier cannot by contract exempt itself from liability for the negligence of itself or its employees. Some of the cases cited go so far as to hold that where there is damage to the property so transported, the burden is on the carrier to show that it was free from negligence. In *Annas v. Railroad Co.*, Mr. Justice Taylor reviewed the authorities, and, in effect, said that this court was committed to the rules of law held in *Railroad Co. v. Lockwood*, 17 Wall. 357; 67 Wis. 55; 30 N. W. Rep. 282. The doctrine of that case seems to be in harmony with what was said in *Richardson v. Railway Co.*, and *Ayres v. Same*, *supra*. Since those cases arose, and since the first was decided by this court, chapter 487, Laws 1887, has been enacted, expressly requiring every railroad corporation operating a road within this state to receive and carry live stock during eight months of the year, including March and April, and prescribing the conditions upon which such stock is to be so carried; and, among other things, declaring that "said railroad company transporting such cars of live stock shall feed and water such stock as shall be unloaded under the provisions of this act at the expense of the railroad company where such stock shall be detained by them for a longer period than six hours." *Sanb. & B. Ann. St. § 1799a*.

There are numerous decisions by courts of high authority in conflict with the cases cited, but we must hold, what we regard as the better doctrine, that, in so far as the contract in question attempted to exempt the company from liability by reason of its own negligence or the negligence of its agents or employees, it is contrary to public policy and void. This really disposes of all the questions raised upon the defendant's appeal calling for consideration. There are exceptions to the admission of certain testimony, as to the usual stop at Antigo, the usual time occupied for such transportation, the rules and orders of the company in respect to the shipping of live stock, but such testimony related to matters respecting which there was substantially no dispute, and under the admitted facts in the case they were of but very little significance. As often stated, this court cannot reverse for errors which do not affect the substantial rights of the adverse party. *Rev. St. § 2829*.

The court refused to allow the plaintiff to take judgment for the value of the horses as found by the verdict. In doing so the court gave effect to the clause of the contract wherein it was agreed that the liability of the company should not in any event exceed \$100 per head. It will be observed that that amount is not named as the value of each horse, and the contract contains no stipulation nor agreement as to the value of the horses, or any of them. In *Hart v. Railroad Co.*, 112 U. S. 331; 5 Sup. Ct. Rep. 151, the plaintiff's recovery was limited to his "agreed valuation" in the contract. The same was true in *Graves v. Railroad Co.*, 137 Mass. 33, where it was held "that the shipper was estopped to claim more than the agreed valuation of the goods." To the same effect: *Hill v. Railroad Co.*, 144 Mass. 286; 10 N. E. Rep. 836; *Brown v. Steamship Co.*, 147 Mass. 58; 16 N. E. Rep. 717; *Alair v. Railroad Co.*, 53 Minn. 160; 54 N. W. Rep. 1073. But where, as here, there is an absence of any agreed valuation in the contract, and the limitation is merely as to the amount of recovery for damages caused by the defendant's negligence, the case comes within the general rule to the effect that the company cannot contract for exemption, either in whole or in part, from liability for the negligence of itself or its employees. *Ibid.*; *Boehl v. Railway Co.*, 44 Minn. 191; 46 N. W. Rep. 333; *McFadden v. Railway Co.*, 92 Mo. 344; 4 S. W. Rep. 689; *Weiller v. Railroad Co.*, 134 Penn. St. 310; 19 Atl. Rep. 702; *Ashendon v. Railway Co.*, 5 Exch. Div. 190; 31 Moak Eng. Rep. 644; *Dickson v. Railway Co.*, 18 Q. B. Div. 176. This is in harmony with the rule held in *Black v. Transportation Co.*, 55 Wis. 319; 13 N. W. Rep. 244. It is to be remembered that the shipper and the railroad company do not contract upon equal terms. Practically the shipper is bound to submit to whatever conditions are exacted by the carrier. To be lawful, such conditions must be reasonable. A contract relieving a carrier wholly or partially from liability for damage caused by its own negligence is unreasonable. We must hold that the plaintiff was entitled to judgment for the amount of his verdict. The result is that the exceptions of the defendant are overruled, and the judgment is affirmed so far as involved in its appeal. On the plaintiff's appeal the judgment is reversed, and the cause is remanded, with direction to render judgment in favor of the

plaintiff and against the defendant for the full amount of the verdict as damages.*

1. **Common carriers—limiting liability for negligence.**—The foregoing case is important as bringing Wisconsin into line with the general current of authority on the subject. See note to *Little Rock, etc., R. Co. v. Cravens*, 7 Am. R. R. & Corp. Rep. 270. For reference to the Wisconsin cases see page 288 of note.

2. **Limiting liability to a specified amount.**—The decision of the principal case upon this point is in accordance with the conclusions reached in note to *Alair v. Northern Pac. R. Co.*, 8 Am. R. R. & Corp. Rep. 445, where the authorities on the question are collected and distinguished.

NEWARK MACHINE CO. v. KENTON INS. CO.

(Supreme Court of Ohio, October 31, 1893.)

1. **FIRE INSURANCE. PAROL CONTRACT. VALIDITY. ASSENT TO TERMS.** A valid contract of insurance may be made by parol, when not forbidden by statute, or a provision of the company's charter which has been brought to the knowledge of the other contracting party; and, as in other cases of parol contracts, the assent of the parties to the terms of the agreement may be shown by their acts and the attending circumstances, as well as by the words they have employed.

2. When nothing is said in the negotiations about special rates of insurance, or special conditions of the policy, it will be presumed that those which were usual and customary were intended.

3. **COMPLETION OF CONTRACT. DELIVERY OF POLICY.** In determining whether there has been a delivery of a policy, effect will be given to the intention of the parties; and when the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent.

4. **POWER OF AGENT TO WAIVE PREPAYMENT OF PREMIUM.** An agent authorized to make contracts of fire insurance and issue policies may waive payment in cash of the premiums, and give time for their payment, unless there are restrictions upon his authority of which the insured has notice; and such waiver may be express or implied.

5. **WHERE WAIVER OF PREPAYMENT MAY BE IMPLIED.** Where, under an arrangement with the insured by which his insurance was to be kept up to a specified amount by renewals or new policies, it was the custom of the agent to charge the premiums as policies were issued or renewed, and have periodical settlements with the insured, when the premiums would be paid, a credit for a premium so charged to the next period of settlement may be implied.

* Reported in 58 N. W. Rep. 780.

THE action below was brought by the Newark Machine Company against the Kenton Insurance Company of Kentucky to recover the amount of a policy of fire insurance. The issue tried was whether the contract of insurance had been consummated by the parties. The plaintiff prevailed in the Court of Common Pleas, but the judgment there obtained was reversed by the Circuit Court, and error is prosecuted here to the judgment of that court. A further statement of the facts that are pertinent to the questions involved is contained in the opinion.

Kibler & Kibler, for plaintiff in error. *R. D. Marshall*, for defendant in error.

WILLIAMS, J. The facts of the case, as shown by the record, and about which there is no controversy, are substantially as follows: On the 30th day of June, 1884, the plaintiff, a corporation, owned and was operating a large manufacturing plant in the city of Newark, and had been the owner and operator of it for several years. The defendant, a fire insurance company, then had an established agency in Newark, in the charge of H. D. Murphy, who was also the agent of a number of other fire insurance companies, among them the Norwich Union Company. He was a regularly commissioned agent of these companies, and was provided by them with blank applications, and policies duly signed by the proper officers, to be filled up and countersigned by him as agent, and delivered in the course of the business of his agency; and also with registers in which to keep a record of the business, and blanks for making reports of the same to the respective companies. He had, during the existence of his agency, issued a large number of policies of different companies represented by him to the plaintiff, insuring its buildings, machinery and stock against loss or damage by fire, one of which was a policy on the stock for \$5,000 in the Norwich Union, issued a short time prior to June 30, 1884. There was an understanding between the managing officer of the plaintiff and Murphy that the latter should keep the insurance of the plaintiff up to a certain amount, either by renewals or new policies in good companies represented by him; and his course of dealing with the plaintiff under that understanding was to charge up the amount of the premiums to

the plaintiff when policies were issued or renewed, and have periodical settlements, usually once a month, when the premiums would be paid. The Norwich Union, not desiring to carry so large an insurance on the plaintiff's stock, a few days prior to the 30th of June, 1884, directed Murphy to reduce its risk to \$2,500. He thereupon, on the 30th day of June, 1884, filled up for that amount one of the blank policies which that company had furnished him, duly signed by its proper officers, and countersigned it as agent, and at the same time filled up, for the same amount, one of the blank forms of policy with which the defendant company had supplied him, duly signed by its officers, and countersigned the same as its agent, ready for delivery. He made the customary entries of the issuing of the policies in the registers of the respective companies, and in that of the Norwich Union an entry also of the cancellation of the \$5,000 policy, in place of which the two policies he had so filled up were intended to be substituted. On the 2d day of July, 1884, he forwarded to the defendant, at its home office in Covington, Ky., what is called a "daily report," in which he gave the number of the policy he had written for the plaintiff, its date, amount and duration, the rate and amount of the premium, a description of the property insured, and other particulars of the risk. This report was received at the home office July 3, 1884. The premium on the \$5,000 policy had been fully paid by the plaintiff, and when the entry of its cancellation was made the policy had run but a short time. The unearned or returned premium was carried to the credit of the plaintiff on the books of the agent, and the amount of the premiums due on the two new policies was charged to the plaintiff by the agent in accordance with his previous custom. At the next regular settlement between the plaintiff and the agent, which was made July 7, 1884, there was due him from the plaintiff, on account of premiums on various policies, the sum of \$438.55, which amount included the balance due on the policy of the defendant. The amount due on the account was then paid by the plaintiff. When the policy of the defendant was written, and the cancellation entered of the Norwich Union policy, the latter was in the possession of F. S. Wright, cashier of the First National Bank of Newark, as collateral. Wright was also vice-president of the plaintiff and looked

after its insurance. On the 30th day of June, 1884, after writing and executing the two new policies, and entering the cancellation of the one for which they were intended to be substituted, the agent called at the bank to see Mr. Wright, take up the policy so held by him and deliver the new ones in its place. Wright was absent, and the agent failed to see him. He called several times within the next day or two with like results, and did not see Wright until the evening of July 3, 1884, after the bank had closed. The agent then informed Wright that at the request of the Norwich Union Company he had canceled its policy for \$5,000, which Wright then held, and issued to the plaintiff in its place two other policies for \$2,500 each, which he proposed to deliver and take up the canceled policy. Wright replied that was all right; all he wanted was to have it so that the amount was the same, and he (the agent) could call at the bank any time when it was open and make the exchange, and if he (Wright) was not in the person in charge would make the exchange for him. There appears to have been no reason why the exchange was not made at the time of the interview on the evening of July third, except that the bank was then closed. No claim was thereafter made by the plaintiff to the canceled policy, nor was there any question at the trial of Wright's authority to act for the plaintiff, or of that of the agent, Murphy, to act for the defendant. The property was totally destroyed by fire on the 5th day of July, 1880. At that time the new policies had not been actually delivered, or the old one taken up. Immediately after the fire the defendant was notified of it by telegram from the agent, who received from the defendant the following response: "Yours received. Have telegraphed you for list of companies on stock with us. The list sent to Cincinnati made no mention of Kenton, and we were willing to be ignored. George C. Coker, Secretary." It was admitted on the trial that proof of the loss was duly made and filed with the defendant; that Wright then had no interest in the claim, and if the plaintiff was entitled to recover the amount of the recovery should be \$2,500, with interest from September 30, 1884.

It does not appear that the names of the companies in which the new policies had been written were mentioned in the interview between Wright and the defendant's agent, nor the rate or amount

of the premium, nor the duration or conditions of the policies; and it is claimed by the defendant that there was, therefore, no mutual assent of the parties to either of those terms, and so no completed contract of insurance between them. It is undoubtedly true that those are essential elements of a contract of insurance, and, if there was not a meeting of the minds of the parties upon them, the contract was not consummated, and no risk attached. But it is equally true that the agreement need not be expressed in words; it may be implied from the circumstances, and conduct of the parties. If the case of *Cockerill v. Insurance Co.*, 16 Ohio, 148, in which it was held that a policy of insurance, to be valid, must be in writing, was not virtually overruled by the case of *Insurance Co. v. Kelly*, 24 Ohio St. 345, as it was said to have been by Okey, J., in the case of *Insurance Co. v. Wall*, 31 Ohio St. 633, it has been so qualified by these subsequent cases as to limit the rule it announced to policies in their strict technical sense, and leave unaffected by it parol contracts of insurance. It is now well settled that a policy is only evidence of the contract, and the latter may be shown by parol, when the policy has not been written, or is withheld, unless such contract is forbidden by statute or a provision of the company's charter which is brought to the notice of the other contracting party (*Ostr. Ins.* §§ 13, 14; *Richards Ins.* § 140; *Insurance Co. v. Shaw*, 94 U. S. 574; *Insurance Co. v. Kelly*, *supra*; *Palm v. Insurance Co.*, 20 Ohio, 529, 537), and, as in other cases of parol contracts, the terms of the agreement, and the assent of the parties to them, may be shown by their acts and the attending circumstances, as well as the words they have employed. There was, in this case, no express agreement in regard to the property to be insured by the new policies. The property was not mentioned in the interview between the defendant's agent and Wright. But, as it was agreed the new policies were to be exchanged for the canceled policy, it must have been as clearly understood as if it had been expressly stated that they were to cover the property included in the canceled policy. So, in regard to the rate and amount of the premium, and form and conditions of the policy. It is not claimed that the conditions of the defendant's policies, or its rate of insurance, are different from those of like companies; and it is generally known that the form and conditions of fire policies in use by good com-

panies do not differ substantially, and the rates of insurance are established and uniform on the same classes of property. And, where nothing is said, in the negotiation for insurance, about special rates or conditions, it may be presumed that those which were usual and customary were intended. In Richards on Insurance (2d ed. § 42) it is laid down as a general rule that, "whether the contract of insurance is closed by parol or by a preliminary binding receipt, the legal presumption is that the usual policy is to follow." And in the preceding section the same author says that it is not necessary that all the particulars of a contract should be made the subject of express stipulation, "for it may well be understood, in the absence of express declaration to the contrary, that the usual form of policy is acceptable to both parties." It was held by the Supreme Court of Minnesota in Salisbury v. Insurance Co., 32 Minn. 460; 21 N. W. Rep. 552, that "upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases." And in Eames v. Insurance Co., 94 U. S. 629, Mr. Justice Bradley says: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

Upon the facts of the present case there can be but little doubt that the contract of insurance made by the defendant, through its agent, with the plaintiff, was complete in all its terms. The plaintiff had previously arranged with the agent to keep its insurance up to a certain amount in good companies, for which he was authorized to act. This arrangement virtually left the selection of the companies to the discretion of the agent, and, acting under it, he had written the policy of the defendant and the new policy of the Norwich Union Company each for \$2,500, and duly countersigned both, ready for delivery to the plaintiff, and entered

the cancellation of the policy which Wright had in his possession before the interview of July third. The policy of the defendant was then complete, containing a description of the property, the amount, commencement and duration of the risk, the rate and amount of the premium, and all the terms and conditions usual in such policies. This policy, and the new policy of the Norwich Union, the agent proposed to Wright to exchange for the canceled policy, without condition or qualification. The proposition was immediately assented to and accepted without any qualification or condition whatever. The terms of the contract of insurance thus proposed by the defendant, through its agent, were definite and certain in every particular. They were those set forth in the policy. The acceptance was as broad as the proposition, and was, therefore, an acceptance of all the terms and conditions of the policy as it was written. That the plaintiff chose to accept the proposition unqualifiedly without further inquiry or examination affords the defendant no ground for claiming the contract was, on that account, incomplete. The only reason the exchange was not then made was that the canceled policy was locked up in the bank. The parties evidently regarded the exchange as complete, and thereafter the agent was a mere custodian of the policy in question for the plaintiff, and the actual handing of it over was not essential to the risk. Effect will be given to the intention of the parties, and what their conduct shows they considered a delivery must control in determining whether it was made. *Bid. Ins.* § 149; *Dibble v. Assurance Co.*, 70 Mich. 1; 37 N. W. Rep. 704; *Bodine v. Insurance Co.*, 51 N. Y. 117; 11 Am. & Eng. Ency. of Law, 285. It is quite evident the agent considered the policy of the defendant in full force. He reported it as such to the company, and that the latter so treated it, even after the fire, is shown by its telegram to the agent, inquiring what companies were "on stock with us." The policy was on the stock of the plaintiff in its manufactory. The manual surrender by Wright of the policy in his possession was not, we think, necessary to effect its cancellation. His assent to the cancellation made by the agent was sufficient. It then ceased to be of any force, and was so treated by the parties.

The only other ground upon which it is claimed the defendant

is not liable is that the premium was not paid until after the loss occurred. Murphy was the duly-commissioned agent of the defendant, authorized to make contracts of insurance, collect premiums, and issue and renew policies; and to that end was furnished by the defendant with printed forms of policies, signed in blank by the president and secretary of the company, to enable him, without conference with them, to countersign and issue the policies in behalf of the company. It is well settled that such an agent is the general agent of the company, and may, in his dealings with those he insures, waive payment in cash of the premiums, and, indeed, any of the conditions of the policy, except when a restriction upon his authority is in some way brought to the knowledge of the insured. In a recent and valuable work on insurance it is said that a fire policy "does not ordinarily make the payment of the premium a condition precedent to the validity of the contract, and a general agent may, of course, extend credit to the insured or not, as he chooses. The general custom, where credit is given, is for the agent to do so on his own responsibility. But, in case the agent should make default in accounting to the company, the policy will nevertheless be valid. And though the policy provide that it shall not take effect until the premium is paid in cash, the general agent has power to waive the premium, and will be held to have waived it if he delivers the policy without enforcing payment." Richards Ins. (2d ed.) § 95. And in section 93 of the same work that author says: "An agent of a life company, who is intrusted with the business of closing the contract by delivering the policy, is held to have an implied authority to determine how the premium then due shall be paid, whether by cash, or, as is sometimes done, by giving credit; in which case the agent becomes the creditor of the insured and the debtor of insurer. In that event, though the agent subsequently defaulted, and the money never reached the company, the policy would still be binding. By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it. But this is based upon his possession of the document for purposes of delivery, and his instructions to deliver it, and consequently his power does not extend to subsequent premiums or premium notes." Bodine v. Insurance Co., 51 N. Y. 117. The authorities on this subject are extensively collected in that

very convenient and almost indispensable work, the American and English Encyclopædia of Law (vol. 11, p. 333). The waiver of the payment of the premium in cash is an act within the exercise of the agent's general authority to issue policies and collect the premiums, and such waiver may be either express or implied; and when, as in the case before us, it has been the custom of the agent, under an arrangement with the insured by which the latter's insurance should be kept up to a certain amount by renewals or new policies, to charge the insured with the premiums as policies were issued or renewed, and have periodical settlements when the premiums would be paid, a credit for a premium so charged to the next period of settlement may be fairly implied. We see no reason, upon the facts of this case, why the plaintiff should not recover, as it did in the Court of Common Pleas. The judgment of the Circuit Court is, therefore, reversed and that of the Common Pleas affirmed.*

FIRE INSURANCE — RECENT DECISIONS.

1. Agents — whether of insurer or insured.—The soliciting agent of an insurance company is not made the agent of the insured by inserting in the policy a stipulation to that effect, so as to render the insured chargeable with errors of such agent in preparing the application. *Meyers v. Lebanon Mut. Ins. Co.*, 156 Penn. St. 420; 27 Atl. Rep. 39.

2. Agent — effect of notice to clerk of.—A communication of facts material to a risk, made to a clerk sent by an agent to solicit insurance, is notice to the company. *Bergeron v. Pamlico Ins. & Banking Co.*, 111 N. C. 45; 15 S. E. Rep. 883.

3. Knowledge of general agent is knowledge of company.—The knowledge of the general agent of an insurance company, who writes and issues a policy of insurance, concerning the title of the premises insured, is the knowledge of the insurance company. *Capitol Ins. Co. v. Bank of Pleasanton*, 50 Kans. 449; 29 Pac. Rep. 578; 31 Pac. Rep. 1069.

4. Application — effect of misstatements in application filled out by agent of insurer.—Where the agent of an insurance company, with knowledge as to the amount of incumbrance, misstated such amount in an application for insurance made out by him, and which plaintiff, without reading, signed, and the agent assured plaintiff that the application was all right, and that she was fully protected, the defendant company cannot deny its liability, under a provision of the policy that the application was a warranty as to the material facts, and that a misstatement would void it, the company being presumed to have the knowledge of its agent. *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514; 53 N. W. Rep. 818. To same effect: *Steele v. German Ins.*

* Reported in 35 N. E. Rep. 1060.

Co., 93 Mich. 81; 53 N. W. Rep. 514; Bowlus v. Phoenix Ins. Co., 133 Ind. 106; 32 N. E. Rep. 319.

5. Arbitration.—*Stipulation too indefinite for enforcement.*—A stipulation for a submission to arbitration, which does not provide for the number of arbitrators, nor the mode of their selection, is too indefinite to be enforced. Greiss v. State Invest. & Ins. Co., 98 Cal. 241; 33 Pac. Rep. 195.

Whether arbitration a condition precedent to suit.—The insured is not precluded from suing on a policy by a provision therein that the amount to be paid, in case of disagreement, shall be submitted to arbitration, but not expressly or by implication prohibiting suit until after such arbitration. Mutual Fire Ins. Co. v. Alvord, (Ct. of App.) 61 Fed. Rep. 752. Where a stipulation is contained in an insurance policy that, "in case differences shall arise as to the amount of any loss or damage, * * * the matter shall, at the written request of either party, be submitted to two impartial appraisers," and it does not appear that any differences of opinion ever arose with regard to the amount of the loss or damage, and neither party ever presented to the other any request that appraisers or arbitrators be appointed, it is not necessary that there shall have been any appraisal or arbitration before the assured can sue for the recovery of his loss. Capital Ins. Co. v. Wallace, 50 Kans. 453; 31 Pac. Rep. 1070. To same effect: Vangindertaelen v. Phoenix Ins. Co., 82 Wis. 112; 51 N. W. Rep. 1122; Harrison v. Hartford Fire Ins. Co., 59 Fed. Rep. 732.

Where a policy provided that in case of difference as to the amount of the loss, the matter should be submitted to arbitration, and further that no suit should be sustained under the policy until after full compliance by the assured with all the conditions of the policy, and it appeared that a difference had arisen as to the amount of the loss, it was held that a compliance as to arbitration was a condition precedent to a right of action. Mosness v. German-American Ins. Co., 50 Minn. 341; 52 N. W. Rep. 932. To same effect: Kahnweiler v. Phoenix Ins. Co., 57 Fed. Rep. 562; Connecticut Fire Ins. Co. v. Hamilton, (Ct. of App.) 59 Fed. Rep. 258.

Arbitration can only be demanded in strict conformity to policy.—The defendant has no right to insist on the execution of a written agreement to arbitrate, containing provisions not stated in the policy; and where it insists on the execution of such written agreement before submission to the arbitrators it waives its right to arbitration under the policy. Walker v. German Insurance Co., 51 Kans. 725; 33 Pac. Rep. 597.

Rights of mortgages when loss payable to him.—Where a fire insurance company, by the direction of the insured, indorses on his policy an agreement that it will pay the loss, if any, to the mortgagee of the property, and the policy provides that at the request of either party the loss shall be fixed by arbitrators, and the amount so fixed shall be binding on the parties, the mortgagee is not bound by the result of an arbitration entered into between the insured and the company. Bergman v. Commercial Union Ass. Co., 92 Ky. 494; 18 S. W. Rep. 122. The contrary is held in Chandos v. American Fire Ins. Co., 84 Wis. 184; 54 N. W. Rep. 390.

Waiver of provision as to arbitration.—A provision in a policy of insurance for arbitration is of no force where the insurance company denies its liability

on the policy. *Union Ins. Co. v. Barwick*, 36 Neb. 223; 54 N. W. Rep. 519. To same effect: *Savage v. Phoenix Ins. Co.*, 12 Mon. 458; 31 Pac. Rep. 66. Contra: *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. Rep. 562. A failure to request in writing an arbitration under the policy was held to amount to a waiver in *Walker v. German Ins. Co.*, 51 Kans. 725; 33 Pac. Rep. 597.

Several insurance companies having made a joint demand for a joint appraisal, upon proof of loss by the insured, finally notified the insured in a joint letter that, if the form of "submission to appraisers" which they had submitted contained any provision or condition limiting or defining the duties of the appraiser not prescribed by the several policies, each company would submit its own form, as they desired and demanded a submission free from any condition imposed by either party. Held, in a suit against one of said companies, where the policy stipulated for a separate appraisal, that, under the terms of the joint letter, the company thereby waived the appraisal, unless it thereafter submitted a form of appraisal within a reasonable time. *Insurance Co. v. Hamilton*, 8 C. C. A. 114; 59 Fed. Rep. 258, approved. *Hamilton v. Phoenix Ins. Co.*, (Ct. of App.) 61 Fed. Rep. 379.

In an action on an insurance policy defendant set up as a defense that the question as to the amount of the loss had been, according to the provisions of the policy, submitted to arbitration, and that plaintiffs had instituted suit before such appraisal was concluded. It appeared that defendant's appraiser refused to agree on an umpire, and nominated persons unknown to plaintiffs' appraiser, and living 200 miles distant from the place where the property was destroyed. It further appeared that his refusal to agree to persons nominated by plaintiffs' appraiser was without excuse, and his conduct was virtually a refusal to proceed with the appraisal. Held, that the fact that the appraisal had not been concluded was not a defense to the action. *McCulloch v. Phoenix Ins. Co.*, 113 Mo. 606; 21 S. W. Rep. 207.

Setting aside award because arbitrator "interested" — construction of words "disinterested person." — In an action to set aside an award of appraisers, and to recover the amount of the loss, on a fire insurance policy providing that in case of disagreement the loss shall be ascertained by two "competent and disinterested persons" to be chosen by the parties, there was evidence that before any attempt to adjust the loss defendant insisted on the appointment of an expert person brought by it from a distant place, and unknown to plaintiffs, who had on six or more occasions acted as appraiser for defendant, and as many times for other companies; that after being appointed he regarded himself as the special representative of the company, to protect its rights, and said he proposed to stand by whatever rights "we" had; that he took the leading part in the appraisement, controlling the other appraiser; and that the award was \$1,760, when the actual loss was \$2,750. Held, that a finding that defendant's appraiser was not a "disinterested person" was supported by the evidence, and that the award should be set aside and the assured permitted to recover the actual loss sustained. *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137; 32 N. E. Rep. 1055. In such case the word "disinterested" is not limited to a lack of pecuniary interest, but means that the appraiser must not be biased or prejudiced. *Ibid.*

The fact that one of three referees appointed, under a provision in a policy

of insurance, to fix the amount of loss, was indorser on an unmatured note made by the insured, and secured by mortgage, does not render the reference void, in the absence of anything to show that such referee was actually interested in the recovery on the policy. *Bullman v. North British, etc., Ins. Co.*, 159 Mass. 118; 34 N. E. Rep. 169.

Validity of award—fraud, mistake, etc.—In an action against an insurance company it appeared that the policy described the insured property as a “pulp mill and the machinery therein,” and provided for a decision as to the amount of loss by appraisers. A tramway was destroyed, which was not included in the award of the appraisers, or in the schedule submitted to them, and their attention was not called to it. Held, that the award was valid, since there was nothing in the description of the property that would suggest a tramway, and since it was the fault of the assured if the tramway ought to have been considered and was not. *Chandos v. American Fire Ins. Co.*, 84 Wis. 184; 54 N. W. Rep. 390. An award made not as the result of the judgment of the arbitrators, but on an agreement between one party and the arbitrators authorized by the other party, is not binding where the consent of a party was obtained by fraudulent means, such as the concealment of information as to the cost of the property. *Stockton Combined Harvester, etc., Works v. Glens Falls Ins. Co.*, 98 Cal. 557; 33 Pac. Rep. 633.

The insured in a policy against loss or damage by fire is entitled to recover for any loss or damage proximately caused by a fire, and, in case of a provision in the policy requiring an appraisal of the loss, is not concluded by an award, which, through the fault of the company’s adjusters, is limited to damage to such goods only as are visible at the time of the appraisal. *Hong Sling v. Scottish Union Nat. Ins. Co.*, 7 Utah, 441; 27 Pac. Rep. 170.

6. Assignment of policy.—Where insured property is transferred by a woman to her husband, and the policy is assigned to him with the insurer’s assent, he becomes the insured, and may maintain an action on the policy in his own name. *Bullman v. North British, etc., Ins. Co.*, 159 Mass. 118; 34 N. E. Rep. 169. A pre-existing debt is a sufficient consideration for an assignment of insurance policies after loss of the property insured. *Glover v. Lee*, 140 Ill. 102; 29 N. E. Rep. 680.

7. Cancellation.—A local custom that insurance agents, after the termination of their agency, may cancel any of the policies issued through them, is unreasonable, subversive of the principles upon which the rules of law governing the relation of principal and agent are based, and is void. *Merchants’ Ins. Co. v. Prince*, 50 Minn. 53; 52 N. W. Rep. 181.

A notice to the holder of a policy, declaring the effect of the holder’s failure to pay the premium agreed, and directing “attention” merely to the cancellation conditions of the policy, is not such a notice of cancellation as is demanded by the policy. *Savage v. Phoenix Ins. Co.*, 12 Mon. 458; 31 Pac. Rep. 66.

8. The contract—what sufficient to make it complete and binding.—Plaintiff applied to an insurance agent for a specified amount of insurance on certain property, and intended the policies to be issued at once, but the companies in which they should be issued were not mentioned, nor was the rate. The agent said he would issue them right away, but they were not delivered

for several days thereafter, during which time the property was destroyed, and they were in the aggregate for a smaller amount than applied for. They were signed before the fire. Held, that though the policies were not delivered to or ratified by plaintiff before the loss occurred, there was a valid contract existing at the time with each company in which the agent issued a policy, as the agent acted for plaintiff in choosing the companies and distributing the risk. Grant, J., dissenting. *Michigan Pipe Co. v. Michigan Fire & M. Ins. Co.*, 92 Mich. 482; 52 N. W. Rep. 1070.

Plaintiff's agent, M., on June twenty-eighth, ordered S., an insurance agent, to write up a certain amount of insurance for plaintiff, mentioning no companies. S. told M. that he wished to place the insurance in companies which he (S.) represented: that some of his lines were full, but that some policies would expire July first; that he expected to get the agency for other companies, and expected to place some of the insurance in these companies; and that, as he wanted to get the insurance into his next month's report, he would not write up any till the first of the month. Held, that there was evidence to support a contract for insurance to begin as late as July third, at which time S. distributed the insurance, and wrote up the policies. *Michigan Pipe Co. v. North British & Mercantile Ins. Co.*, 97 Mich. 493; 56 N. W. Rep. 849. In order to make a binding contract for insurance, it was not necessary that anything should have been said about the rate of insurance, or the time the insurance was to run, it appearing that the rate for the class of property was a fixed rate; that the usual term was a year; and that M. had for five years dealt with S. for the parties interested in plaintiff company, and had insured with S. for them to the extent of \$50,000 to \$100,000 annually, and knew the rate and the usual term. *Ibid.*

In an action against an insurance company on an alleged contract of insurance, it appeared that, when plaintiff's policy with defendant was about to expire, plaintiff's manager directed its cashier, who, as such, was authorized to pay premiums on insurance, to renew the policy. Plaintiff's cashier was also defendant's agent, with authority to issue policies, and he promised to renew the policy, but neglected to do so; and the property was destroyed after the policy had expired. He testified that he intended to renew the policy, and thought that he had renewed it. Held, that there was no contract of insurance. *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41; 29 Pac. Rep. 826.

In an action on an insurance policy it appeared that defendant's agent wrote the policy, and forwarded it to one S. for tender to plaintiff, in renewal of an expired policy. In the meantime the property covered by the policy had been burned. The agent heard of this on Sunday, and wired S. not to deliver the policy. On the same day S. told plaintiff that the policy had been received and had been recalled. On the next day plaintiff wired S. to hold the policy. The policy having been returned was demanded of the agent, and was afterwards again demanded, when the premium was tendered for the first time. Held, that no contract of insurance was made. *New York Lumber & Wood Working Co. v. People's Fire Ins. Co.*, 96 Mich. 20; 55 N. W. Rep. 434.

9. Parol contract — validity.— A fire insurance company may make a parol contract of insurance. *Stickley v. Mobile Ins. Co.*, 37 S. C. 56; 16 S. E. Rep. 280.

10. Construction of contract — divisibility.— Where an insurance policy places specific amounts of insurance on separate kinds of property, and inserts a prohibition against mortgage as to one kind alone, a violation of that prohibition will not affect the validity of the policy as to the other kinds of property. *Wright v. Fire Ins. Assn. of London*, 12 Mon. 471; 31 Pac. Rep. 87. To same effect: *Continental Ins. Co. v. Ward*, 50 Kans. 346; 31 Pac. Rep. 1079. Contra: *Dohlantry v. Blue Mounds Fire & L. Ins. Co.*, 83 Wis. 181; 53 N. W. Rep. 443; *Barr v. German Ins. Co.*, 84 Wis. 76; 54 N. W. Rep. 22.

11. Inconsistency between written and printed conditions.— Where there was an inconsistency or want of harmony between the printed and written part of the policy, the latter must control. *Russell v. Manufacturers & Builders' Fire Ins. Co.*, 50 Minn. 409; 52 N. W. Rep. 906.

12. Conditions of policy — construction generally.— Conditions in an insurance policy which affect the contract and parties prior to the loss, including all statements and representations preceding the contract, must receive a fair construction, according to the intention of the parties; but those conditions which relate to matters after the loss, defining the mode of adjustment and recovery, must receive a more liberal construction in favor of the insured. *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; 33 N. E. Rep. 475.

Courts will construe a contract of insurance liberally, so as to give it effect, rather than to make it void. Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify a policy. *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342; 47 N. W. Rep. 288. See, also, *Blinn v. Dresden Mut. Fire Ins. Co.*, 85 Maine, 389; 27 Atl. Rep. 263.

A contract of insurance, where the insurer has received and retains the consideration, is to be sustained if possible, and should not be defeated upon any ground which does not materially increase the risk. *Billings v. German Ins. Co.*, 34 Neb. 502; 52 N. W. Rep. 397.

13. Condition as to occupancy.—A policy of insurance purporting to run for one year described the insured property as a "two-story shingle-roof building while occupied by assured as a store and dwelling house," and provided that the policy should be void if the insured property should become vacant or unoccupied. When the policy was written the insured occupied the building partly as a store and partly as a dwelling. Before the fire he ceased to occupy it as a dwelling but continued to occupy it as a store. Held, that the policy was not forfeited. *Burlington Ins. Co. v. Brockway*, 138 Ill. 644; 28 N. E. Rep. 799.

Where the testimony showed that the agent had power to and did issue the policy; that he filled out an application for insurance upon a building in process of construction, to be signed by the owner, and stated in the application that the building was being erected, although it was intended for the use of tenants, and was stated in the policy to be so occupied, held, that, construing the several provisions of the application together, it did appear that the building was in course of construction, and being burned before it was completed the fact that the building was vacant was no defense. *German Ins. Co. v. Penrod*, 35 Neb. 273; 53 N. W. Rep. 74.

Under the condition in a policy of insurance that "if the above-mentioned

premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to and consent of this company, in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the consent of this company indorsed hereon," the policy shall be void, the words "by any means whatever," etc., do not qualify the words "or become vacant or unoccupied," and a vacancy occasioned by a tenant leaving without notice, though not within the control of assured, avoids the policy. *Moriarity v. Home Ins. Co.*, 53 Minn. 549; 55 N. W. Rep. 740.

When an insured building becomes unoccupied the risk of its destruction by fire is presumed to be increased. This presumption alone is sufficient to sustain the burden imposed upon the insurers, unless it is rebutted by the peculiar condition, construction and surrounding circumstances of the building. *White v. Phoenix Ins. Co.*, 85 Maine, 97; 26 Atl. Rep. 1049.

14. Conditions as to incumbrances.—An insurance policy, conditioned to be void if the insured incumbered the property without the company's consent, is not vitiated by incumbrances made by other persons, nor by those made by the assured, not exceeding the original incumbrance when the insurance was effected. *Weiss v. American Fire Ins. Co.*, 148 Penn. St. 349; 23 Atl. Rep. 991.

A warranty against future incumbrances is not broken where, upon the death of one to whom the property is already mortgaged, the assured executes a renewal mortgage to the mortgagee's daughter, and through mistake the amount thereof is made too great. *Bowlus v. Phoenix Ins. Co.*, 133 Ind. 106; 32 N. E. Rep. 319.

A mortgage of chattels to secure a contingent liability of the mortgagee as indorser, and under which the mortgagee does not take possession, is not such change of title as to avoid the policy. *Union Ins. Co. v. Barwick*, 36 Neb. 223; 54 N. W. Rep. 519.

An insurance policy provided that the policy should be void if the property insured be or become mortgaged without the written consent of the company indorsed on the policy; but it appeared that the company issued the policy on mortgaged property without inquiring whether such property was incumbered, which policy was accepted and the premium thereon paid, in ignorance of the provision making it void. Held, that the company, by its action, consented to take the risk under mortgage as effectually as if such consent had been indorsed on the policy. *Wright v. Fire Ins. Assn.*, 12 Mon. 471; 31 Pac. Rep. 87.

15. Conditions as to insured's title or interest.—A condition in a fire insurance policy that it shall be void "if the interest of the insured be not truly stated therein, or if the interest of the insured be other than the unconditional and sole ownership," precludes a recovery where the title to the insured property is in the insured and his wife jointly, in the absence of any proof of fraud or mistake as to the insertion of the condition in the policy. *Schroedel v. Humboldt Fire Ins. Co.*, 158 Penn. St. 459; 27 Atl. Rep. 1077. To same effect: *Liberty Ins. Co. v. Boulden*, 96 Ala. 508; 11 South. Rep. 771.

Where a fire insurance policy provides that it shall be void if the interest of

the insured in the property "be other than unconditional and sole ownership," the fact that one of the insured articles is held merely under a contract of sale, with the title outstanding in the seller, invalidates the whole policy. *McWilliams v. Cascade Fire & M. Ins. Co.*, 7 Wash. 48; 34 Pac. Rep. 140.

Where one of three partners insures the property of the firm as his own, without representing the facts to the company, it will avoid a policy stipulating that "it shall be void if other persons than the insured have an interest in the property, unless it is so represented to the company and expressed in the policy." *McFetridge v. Phoenix Ins. Co.*, 84 Wis. 200; 54 N. W. Rep. 326.

Where an applicant for insurance represented that he owned the premises in fee, his recovery will not be defeated by proof that he has no written evidence of title, since an equitable title is a sufficient stimulus to the preservation of the property. *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77; 10 South. Rep. 355.

16. Conditions as to change of title, interest or possession by foreclosure, legal process, etc.—The owner of mortgaged property insured his equity of redemption. The policy provided that the insurance should cease "in case of any sale or transfer or change of title, * * * or the entering or foreclosure of a mortgage." The mortgagee sold the land under a power of sale in the mortgage, and bid it in himself. The mortgagor remained in possession, notified the mortgagee that he would proceed to set aside the sale, and afterwards obtained a decree setting it aside. After the giving of such notice, but before the entry of the decree, the property was burned up. Held, that the sale being illegal, and made without the mortgagor's consent, did not cause a forfeiture of the policy, the effect of the decree being to render the sale void, at least from the date of the said notice. 28 N. E. Rep. 919, affirmed. *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490; 28 N. E. Rep. 919; 32 N. E. Rep. 914.

A writ of attachment is a "process," within the meaning of the condition of a fire insurance policy providing that, if any change takes place in the title or possession of the property by legal "process," then the policy shall be void. *Carey v. German-American Ins. Co.*, 84 Wis. 80; 54 N. W. Rep. 18. Where a fire insurance policy provides that "if any change takes place in the title or possession of the property, * * * whether by sale, transfer, conveyance, legal process or judicial decree, * * * then and in every such case this policy shall be void," the cause of forfeiture is not limited to some act of omission or commission of the assured, or to a change of possession by a process by his order or under his control. *Ibid.* Where a fire insurance policy on a quantity of cranberries stored in and against a warehouse provides that, if any change in possession of the property takes place, the policy shall be void, a valid levy of a writ of attachment on the greater part of the cranberries works a forfeiture of the policy as to all the berries covered thereby. *Burr v. Insurance Co.*, 54 N. W. Rep. 22, followed. *Ibid.* To same effect as last case and following it is *Burr v. German Ins. Co.*, 84 Wis. 76; 54 N. W. Rep. 22.

The issuance of a scire facias on the property by the mortgagee of the assured does not vitiate the policy, though conditioned to be void if fore-

closure suit has been or shall be hereafter begun. *Weiss v. American Fire Ins. Co.*, 148 Penn. St. 849 ; 23 Atl. Rep. 991.

17. Conditions as to change of title.—An executory contract for the sale of land, by the terms of which the title is not to pass unless the vendee pays the deferred payments, does not constitute a change of title, within the meaning of an insurance policy which declares that a change of title shall avoid the policy. *Home Ins. Co. v. Bethel*, 142 Ill. 537 ; 32 N. E. Rep. 510.

Where the title to property insured by a married woman is held by her as security for a debt due from her husband, a conveyance of the property by her to her husband's assignee in insolvency is a breach of a condition in the policy against alienation, even though the wife, as creditor of her husband, has an interest in the property while held by the assignee. *Brown v. Cotton & Woolen Manufacturers' Mut. Ins. Co.*, 156 Mass. 587 ; 31 N. E. Rep. 691. A voluntary conveyance of insured property is as much a breach of a condition against alienation as a conveyance for a valuable consideration. *Ibid.*

Where a policy of insurance provides that the company will make good to the assured, his executors, administrators and assigns, all loss or damage to his dwelling house, not exceeding the interest of the assured in the property, caused by fire or lightning between certain dates, the company cannot avoid payment of a loss under the policy on the ground that the assured died before the loss occurred, in the absence of a provision for forfeiture for such cause. *German Ins. Co. v. Read's Ex'x*, (Ky.) 13 S. W. Rep. 1080 (not officially reported).

A change of title, by which the contingent interest of the insured to property becomes absolute, will not defeat the insurance. *Continental Ins. Co. v. Ward*, 50 Kans. 346 ; 31 Pac. Rep. 1079.

18. Condition as to repairs.—A condition avoiding the policy in case "mechanics are employed in building, altering or repairing the premises," without notice to or permission of the insurer, is broken, and the policy annulled, by the making of extensive alterations without such notice or permission irrespective of whether the risk was in fact increased during the time of the alterations, or whether, if increased, the increase continued at the time of the loss. Mr. Justice Brewer dissenting. *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452 ; 14 S. C. Rep. 379.

19. Condition as to watchman upon premises—what amounts to compliance.—A warranty by assured, contained in a permit for the insured mill to remain idle and inoperative, that "a watchman shall be employed about the premises night and day," may be complied with, during the day, by the foreman in the lumber yard of assured's adjoining mill, whose duty is overseeing the piling of lumber, keeping watch, together with those under him, on the insured mill, while performing their duties in the lumber yard, such yard extending from the adjoining mill, 450 feet distant, to the line of the insured mill's yard, 150 feet distant, from the mill. *Hooker, Ch. J., and Grant, J., dissenting. Spies v. Greenwich Ins. Co.*, 97 Mich. 310 ; 56 N. W. Rep. 560.

20. Conditions as to other insurance.—A policy of fire insurance issued to a mortgagor, which provides that it shall be forfeited "if the assured, or any other person or parties interested," shall take out any additional insurance,

will not be forfeited by a policy taken out by the mortgagee without the mortgagor's consent, since the mortgagee is not interested in the former policy. *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490 ; 28 N. E. Rep. 919 ; 82 N. E. Rep. 914.

A policy providing that it should be void if the "assured" should have any other insurance without the insurer's consent, is not avoided by the fact that when it was issued a third person had taken out a policy on the property, where it is not shown that the assured had any connection with or interest in the prior policy. *Copeland v. Phoenix Ins. Co.*, 96 Ala. 615 ; 11 South. Rep. 746. See, also, *Haire v. Ohio Farmers' Ins. Co.*, 98 Mich. 481 ; 58 N. W. Rep. 623.

It is a defense to an action on an insurance policy that the assured, in violation of its terms, obtained other insurance without defendant's consent. *Bowlus v. Phoenix Ins. Co.*, 138 Ind. 106 ; 32 N. E. Rep. 819. To same effect: *Replogle v. American Ins. Co.*, 132 Ind. 360 ; 31 N. E. Rep. 947.

The fact that the second policy also contained a clause providing that the existence of other insurance should render it void, and that the insured failed to notify the second insurer of the existence of the first policy, will not render the first insurer liable on the theory that the second policy was wholly void, and hence not a violation of the condition in the first, since, by obtaining a second policy valid on its face, without giving notice to the first insurer, the insured has defeated the purpose of the condition. *Replogle v. American Ins. Co.*, 132 Ind. 360 ; 31 N. E. Rep. 947.

Under a policy providing against other insurance except to a certain amount permitted, with a mortgagee clause making any loss payable to the mortgagee, and providing that he should not suffer for any act or neglect of the mortgagor, his rights are not affected by the mortgagor obtaining more insurance than the amount permitted, even though the policies are in his possession, or though the insurance is taken out by him at the mortgagor's request ; and a policy taken out by him, which, with the insurance then existing, does not exceed the amount permitted, is not invalidated by subsequent insurance by the mortgagor in excess of that amount. *Mutual Fire Ins. Co. v. Alvord*, (Ct. of App.) 61 Fed. Rep. 752.

Where there was additional insurance at the time a policy was issued, in violation of a condition of the policy that it should be void in case the insured had other insurance without the company's assent, the policy is not made binding on the company by the fact that there is no additional insurance at the time the property is burned. *Reed v. Equitable Fire & Marine Ins. Co.*, 17 R. I. 785 ; 24 Atl. Rep. 833. In an action on an insurance policy, which provided that it should be void if the insured had additional insurance without the company's assent, plaintiff cannot, in reply to a plea of defendant that there was such additional insurance, set up that the prior policy contained a like condition, rendering it void at the time defendant's policy was issued, since either both policies are void, or the second policy is void, and the first still valid because of the invalidity of the second. *Ibid.*

21. Notice of other insurance — what sufficient.— The condition of an insurance policy that it shall be void if additional insurance is placed on the property, "unless written notice thereof be furnished to the secretary," is not

complied with by actual notice of such additional insurance by a director of the company. *Bard v. Penn Mut. Fire Ins. Co.*, 153 Penn. St. 257; 25 Atl. Rep. 1124.

22. Condition as to use of naphtha on premises — burning off paint with naphtha torch.— Where a policy provides that if naphtha be kept or used "on the premises" it shall be void, the use of a naphtha torch to burn off the paint on the outside of the building violates the provision, though no naphtha was at any time inside the building. *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475; 33 N. E. Rep. 572.

23. Condition as to night work and keeping fire-extinguishing appliances.— A warranty in a fire insurance policy that the insured is not to work at night or by artificial light, is not broken by the use of artificial light, in the night-time, for a purpose other than performing work. *Mechanics & Traders' Ins. Co. v. Thomas*, 57 Ark. 279; 21 S. W. Rep. 468. In a fire policy insuring a gin house, a warranty that the insured will keep a barrel full of water and two buckets in the same room as, and within ten feet of, the gin stand, obligates him to keep the barrel and buckets where they will be readily accessible in case of fire, and is broken by keeping the barrel in an adjoining room, which is inaccessible at the time of the fire on account of cotton piled around the door, though such barrel is within seven feet of the gin stand. *Ibid.*

24. Increase of risk.— Whenever there has been a change of occupancy or of business, or the erection of an additional building adjoining or near by the insured property, the question whether there has been a material increase in the risk or not is a question of fact, to be determined by the jury; but whether an increase of risk avoids the liability of the insurer is a question of law for the court. *Peet v. Dakota Fire & M. Ins. Co.*, 1 S. D. 462; 47 N. W. Rep. 532.

Insurance of machinery under a policy conditioned to be void only in case the hazard is increased, or any of the products of petroleum of greater inflammability than kerosene are used or kept about the premises, effected at a time when coal is being used as fuel, is not affected by the substitution therefor of "reduced oil," shown to be of less inflammability than kerosene; but the only question is as to the method of using the oil, and whether the hazard is thereby increased. *Grand Rapids Hydraulic Co. v. American Fire Ins. Co.*, 93 Mich. 396; 53 N. W. Rep. 538.

In actions on fire insurance policies issued to an incorporated religious society on its church, it appeared that plaintiff procured a painter to remove the old paint from and repaint the building, which was of wood; that to remove the old paint the painter burned it off by a naphtha torch; and that the painter had been engaged in the work for nearly a month when the building caught fire on a board where the torch had recently been applied. Held, that there was an alteration of "the situation or circumstances affecting the risk," within the meaning of a condition in the policies providing that, in case of such alteration without the consent of the companies, the policies shall be void. *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475; 33 N. E. Rep. 572.

25. Fraud and false swearing — provisions of policy against — construction and effect.— A policy provided that false swearing in the proofs of a loss would avoid the same; and the insurance company, with notice that

the assured had parted with his interest in the property insured, insisted that he should make the proofs of loss. In the sworn proofs the assured was stated to be the owner of the property, and the loss was thereupon adjusted, and the agent of the company authorized to make a draft for the amount of the loss to the order of the person to whom, by the terms of the policy, the loss was payable. Held, that the company could not afterwards avoid liability by claiming that the assured swore falsely as to the ownership of the property. *West Coast Lumber Co. v. State Investment & Ins. Co.*, 98 Cal. 502; 33 Pac. Rep. 258.

The claim for what is justly due under a policy cannot be defeated on the ground of fraud because the insured honestly, and by advice of counsel, included in their claim of loss a quantity of tobacco not belonging to them. *Boyd v. Royal Ins. Co.*, 111 N. C. 372; 16 S. E. Rep. 389.

Plaintiff held a policy of insurance on certain property, which was destroyed by fire. The policy provided that it should be void "in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after the loss." After the fire, and prior to an action on the policy, plaintiff presented a proof of loss, subscribed and sworn to, claiming a loss of \$1,845.75; and at the trial he testified that the value of the property lost was \$2,000. Held, that the fact that the jury found a verdict in favor of plaintiff for only \$500 is not conclusively a finding of fraud on his part, and does not authorize a judgment for defendant on the verdict. *Obersteller v. Commercial Ass. Co.*, 96 Cal. 645; 31 Pac. Rep. 587. In an action on a similar policy to the last the evidence showed that, though plaintiff swore falsely as to the quantity and value of the goods in making out his proofs of loss, they exceeded in value the amount of the insurance. Held, that error could not be predicated on an instruction that "no false swearing in making proof of loss will avoid the policy, unless the evidence satisfies the jury that the plaintiff knowingly and willfully swore falsely as to some material fact, and that the burden of proof is on the defendant to show the willful intent." *Phoenix Ins. Co. v. Summerfield*, 70 Miss. 827; 13 South. Rep. 253.

26. Forfeiture for non-payment of premium or assessments.— Where a policy of insurance provides that failure to pay the premium note at maturity shall make the policy void while the note remains unpaid, but subject to be revived by subsequent payment, a partial payment of the note after maturity does not revive the policy while a balance still remains due on the note. *Carlock v. Phoenix Ins. Co.*, 138 Ill. 210; 28 N. E. Rep. 53.

Where the charter of a mutual fire insurance company provided that a policyholder's failure to pay an assessment within thirty days after notice thereof should suspend the liability on the policy, and a copy of this provision was sent to a policyholder with a notice of an assessment without any explanation, such action was, as to that assessment, a waiver of a provision of the policy by which it was to be suspended for failure to pay an assessment within a shorter time. *MacKinnon v. Mutual Fire Ins. Co.*, 83 Wis. 12; 53 N. W. Rep. 19.

Where there is a default in paying assessments, and the company does not declare the policy forfeited, but continues to make further assessments as

losses occur, it will be a waiver of the cause of forfeiture. *Farmers' Union Ins. Co. v. Wilder*, 35 Neb. 572; 53 N. W. Rep. 587.

27. Forfeiture — declaration of forfeiture unnecessary.— Where a fire insurance policy provides that, if any change takes place in the possession of the property insured, "then the policy shall be void," it is not necessary for the company to declare it void on notice to it of a breach of the condition, to entitle it to take advantage thereof. *Carey v. German-American Ins. Co.*, 84 Wis. 80; 54 N. W. Rep. 18. To same effect: *Manufacturers & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469; 84 N. E. Rep. 553.

28. Garnishment in another state — effect.— Where, before suit brought in North Carolina, the insured, a firm, was sued in Virginia, and the insurance company garnished therein, and the summons therein was served personally on the insurance company, and by publication on the firm, and the suit and service were in accordance with the laws of Virginia, the lien of the Virginia creditors will be binding on the firm and other creditors of the firm, who have subsequently endeavored to subject this debt to the payment of their claims in courts of North Carolina. *Boyd v. Royal Ins. Co.*, 111 N. C. 372; 16 S. E. Rep. 389.

29. Garnishment — right of, when company elects to rebuild.— An insurer who has elected, under the terms of a policy, to rebuild a building destroyed by fire, instead of paying the loss, and who has contracted for its erection, cannot be garnished by a creditor of the insured who has recovered a judgment on a mortgage on the premises executed after they had been insured; and that, although the premises are advertised for sale under the mortgage. *Anderson v. Assurance Co.*, 55 L. J. Q. B. 146, distinguished. *Stone v. Mutual Fire Ins. Co.*, 74 Md. 579; 22 Atl. Rep. 1051.

30. Insurable interest.— One who is in possession of property under contract of purchase from the equitable owner thereof, has an insurable interest therein. *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298; 31 N. E. Rep. 1015. Warehousemen have an insurable interest in cotton stored with them, they having contracted to indemnify the owners thereof for the loss. *Pelzer Mfg. Co. v. Sun Fire Office*, 86 S. C. 213; 15 S. E. Rep. 562.

31. Limitations — construction of provisions limiting time for bringing suit.— Where a fire insurance policy provides that no action shall be maintained thereon until after an arbitration has been had and an award made, nor unless the action shall be commenced within twelve months from the date of the fire, but does not limit the time within which the arbitration must be had, the twelve months' limitation does not begin to run until an award has been made. *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135; 30 Pac. Rep. 307.

32. Measure of damages — rules for estimating loss.— A fire insurance policy, known as "Michigan Standard," issued to plaintiffs on a quantity of lumber, provided that the loss should be ascertained according to the actual cash value of the property at the time any loss occurred, and "in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." It appeared that plaintiffs manufactured the lumber covered by the policy, and it was destroyed by fire; that they owned a large quantity of standing pine timber from which sufficient lumber could be manufactured to replace that destroyed; that they continued to

operate their mill after the loss occurred ; that the actual cost to them to reproduce and replace the lumber would be three dollars and sixty-five cents per one thousand feet less than the actual cash value upon the yards. Held, that the proper measure of damages was the actual cash value at the time of loss, and not the cost of manufacturing, at their own mill, a like quantity of lumber from their own timber. *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 117 ; 44 N. W. Rep. 1055, distinguished. *Mitchell v. St. Paul German Fire Ins. Co.*, 92 Mich. 594 ; 52 N. W. Rep. 1017.

The face of a policy, while insuring the property destroyed to the amount of \$700 against loss or damage by fire, expressly limited such insurance to an amount "not exceeding in any case or under any circumstances the sum aforesaid, nor more than two-thirds of the actual destructible value of the buildings at the time the loss may happen." Held, that the plaintiff was not entitled to recover more than two-thirds of the actual value of the building destroyed, notwithstanding another condition annexed to the policy provided that "in settling a loss, the damage is to be paid in full, not exceeding (in any case or under any circumstances) the whole amount insured, and is to be estimated according to the fair value of the property at the time of the fire." The term "damage," as therein used, may, when considered in connection with the whole contract, properly be construed as referring, not to the amount of loss which the plaintiff has sustained, but rather to the recompense or compensation to which the plaintiff is entitled from the company. *Blinn v. Dresden Mut. Fire Ins. Co.*, 85 Maine, 389 ; 27 Atl. Rep. 263.

In an action upon an insurance policy to recover damages caused by fire to insured household furniture and wearing apparel in actual use, it was not error to instruct the jury that of the property destroyed they should, if possible, find the fair market value ; otherwise, that they should find the fair value from the evidence, and that such value was not what a junk shop or second-hand dealer would give for them, or what they would bring under extraordinary circumstances, or at a forced sale. *Sun Fire Office v. Ayerst*, 37 Neb. 184 ; 55 N. W. Rep. 635.

Where the property destroyed was tobacco it was held that the measure of damages is the cash value thereof at the place of its destruction. *Boyd v. Royal Ins. Co.*, 111 N. C. 372 ; 16 S. E. Rep. 389.

33. Mistake in policy — reformation.—M. and W. applied to an insurance agent to issue a policy to insure the mortgage interest upon the building, upon which the owner had executed a mortgage to W., and they informed the agent that W. had assigned the mortgage to M. for convenience of foreclosure only, and that W. was the sole owner of the mortgage and the indebtedness secured thereby, and the agent thereupon issued the policy, the loss, if any, payable to W., as mortgagee, as his interest might appear. Held, that it was the duty of the agent to assume their rights in the mortgage to be just as they stated them, and draw the policy accordingly; and that M. cannot have the policy reformed by having her name inserted in the place of W.'s, on the theory that she was in fact the owner of the mortgage. *Moeller v. American Fire Ins. Co.*, 52 Minn. 336 ; 54 N. W. Rep. 189.

Property of both father and son was insured as that of the son alone, on their representations to the company's agent that the property of the father

was to go to the son in the event of the father's death, the agent understanding from such representations that the entire property was then vested in the son. Held, in an action to reform the policy after a loss and the refusal of the company to pay for the father's share, that such relief could not be granted, as the agent was misled by the representations, though they were made in good faith. *Cushman v. New England Fire Ins. Co.*, 65 Vt. 569; 27 Atl. Rep. 426.

Where, in an action on an insurance policy, defendant denies that any property was destroyed on the premises insured, and plaintiff alleges no other facts bearing on this issue, evidence is inadmissible on behalf of plaintiff to show that the policy was intended to cover the property destroyed, and through mistake described other premises. *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516; 51 N. W. Rep. 29.

84. Notice and proofs of loss — time, sufficiency, waiver, etc.—*Whether failure to furnish within the time specified forfeits the policy.*—Under the provisions of a fire policy that assured should within six days give notice of loss, and within thirty days thereafter render proofs of loss, loss to be payable sixty days after receipt of proof of loss at the company's office, but which does not provide that failure to render such proofs within the time named shall operate as a forfeiture, failure to furnish proofs within thirty days will not operate as a forfeiture of the policy, but will merely postpone the maturity of the claim. *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112; 51 N. W. Rep. 1122. To same effect: *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. Rep. 562; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298; 31 N. E. Rep. 1015.

Failure to furnish proofs of loss within sixty days after a fire, as required by a policy of insurance, will not forfeit the right of an assured to recover on the policy in the absence of a provision making such failure a cause of forfeiture, even though the policy contained a stipulation that no action could be maintained on it until after full compliance with all its requirements. *Rynalski v. Insurance Co.*, 96 Mich. 395; 55 N. W. Rep. 981; *Steele v. German Ins. Co.*, 93 Mich. 81; 53 N. W. Rep. 514.

In case of total loss of buildings formal proofs of loss are held to be unnecessary in Pennsylvania. *Weiss v. American Fire Ins. Co.*, 148 Penn. St. 349; 23 Atl. Rep. 991; *Insurance Co. v. Moyer*, 97 Penn. St. 441; *Insurance Co. v. Dougherty*, 102 Penn. St. 568; *Insurance Co. v. Cusick*, 109 Penn. St. 157; *Insurance Co. v. Hocking*, 115 Penn. St. 406.

Where an insurance policy contains a stipulation that persons sustaining loss shall "forthwith" give notice in writing of said loss to the company, the fact that the formal notice is not given until twelve days after the fire will not work a forfeiture of the rights of the assured, if it appears that no harm was caused by the delay, and that the company did not at any time intend to pay the loss. 29 Pac. Rep. 755, affirmed. *Capitol Ins. Co. v. Wallace*, 50 Kans. 453; 31 Pac. Rep. 1070.

A stipulation in a policy of fire insurance that "in case of loss or damage by fire the assured shall, * * * within sixty days, render an account of the loss or damage signed and sworn to, stating," etc., held, a condition precedent to the right of recovery, as well in respect to time as in other respects.

Bowlin v. Insurance Co., 36 Minn. 433; 31 N. W. Rep. 859, followed. Shapiro v. Western Home Ins. Co., 51 Minn. 239; 53 N. W. Rep. 463. The policy in this case contained a provision that no action could be maintained upon it until after full compliance with all its conditions and requirements. The question presented was, therefore, the same as that decided in the Michigan cases, above cited. In the Minnesota case the following authorities are relied upon: Smith v. Insurance Co., 1 Allen, 297; Insurance Co. v. Lindsey, 26 Ohio St. 348; Underwood v. Insurance Co., 57 N. Y. 500; Blossom v. Insurance Co., 64 N. Y. 162; Scammon v. Insurance Co., 101 Ill. 621; Hanna v. Insurance Co., 36 Mo. App. 542; Gale v. Insurance Co., 33 Mo. App. 664; Gould v. Insurance Co., 51 N. W. Rep. 455.

Sufficiency of proofs or notice.—Where a policy of fire insurance provided that the assured should give written notice of loss, and that payment would be made on receipt of proof of loss, but did not state in what manner the proofs should be made, nor by or to whom the notice should be given, it was sufficient that the company's local agent immediately notified it of the loss, and that it thereupon sent an adjuster, who investigated the loss, and made an estimate of the same. Phoenix Ins. Co. v. Perry, 131 Ind. 572; 30 N. E. Rep. 637.

Under Laws of Iowa, 1880, chapter 211, section 3, requiring the holder of a policy of fire insurance to give notice of loss, "accompanied by an affidavit stating how the loss occurred," the notice and affidavit need not be attached together, or delivered at the same instant. Russell v. Fidelity Ins. Co., 84 Iowa, 93; 50 N. W. Rep. 546.

Where proofs of loss are required to be rendered to the company "as soon after the fire as possible," proofs served ten days after the fire are not too late. McNally v. Phoenix Ins. Co., 137 N. Y. 389; 33 N. E. Rep. 475.

Waiver of proofs.—A denial of all liability by the insurer, before the time to make proofs of loss has expired, waives the requirements of the policy as to furnishing such proofs. Weiss v. American Fire Ins. Co., 148 Penn. St. 349; 23 Atl. Rep. 991; Savage v. Phoenix Ins. Co., 12 Mon. 458; 31 Pac. Rep. 66; Young v. Ohio Farmers' Ins. Co., 92 Mich. 68; 52 N. W. Rep. 454; Stickley v. Mobile Ins. Co., 37 S. C. 56; 16 S. E. Rep. 280. Where the adjuster of an insurance company calls upon the insured shortly after the fire, makes out proofs of loss complete except the signature, and leaves same with the company's local agent, basing his refusal to pay the policy on the ground that there has been a change of title, such action tends to show a waiver by the company of the requirement as to furnishing proofs of loss. Home Ins. Co. v. Bethel, 142 Ill. 537; 32 N. E. Rep. 510.

Provisions of an insurance policy covering a stock of goods for notice of loss within a specified time, and in a particular manner, will be held to have been waived by the insurer, where, with knowledge of the loss of part of said stock by fire, it by its adjusting agent demands and obtains possession of the remainder of the goods and books of the insured, and is engaged for several days, with the help of the latter, in ascertaining the amount of the loss. St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351; 53 N. W. Rep. 137.

Though an insurance policy denies the power of any representative of the company to waive any condition except as therein allowed, the company's

adjuster, sent to investigate a loss, has power to receive or refuse proofs of loss, and his statement, when offered informal proofs of loss by the assured, that they were not required, amounts to a waiver of them. *Young v. Ohio Farmers' Ins. Co.*, 92 Mich. 68 ; 52 N. W. Rep. 454.

An agent of an insurance company, who is given full power to receive proposals of insurance against loss and damage by fire within a given territory in this state, and is authorized to fix rates of premium, to receive moneys, and to countersign, issue and renew policies of insurance, is a general agent of such company, and may, after loss, bind the company by a parol waiver of the condition as to furnishing complete proofs of loss within thirty days after such loss shall have occurred, with builder's estimate of the value of the building, notwithstanding the policy provides that a waiver shall be void unless it is in writing signed by the agent and indorsed thereon. *Phoenix Ins. Co. v. Munger*, 49 Kans. 178 ; 30 Pac. Rep. 120.

Where a policy provides "that in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators," and differences as to the amount of loss arise and the company demands arbitration, proofs of loss are waived. *Walker v. German Ins. Co.*, 51 Kans. 725 ; 33 Pac. Rep. 597.

Where a local recording agent, with authority to issue policies of insurance and deliver them, and to collect premiums, and whose business it was to notify his company of any fire which might occur within his territory, advised his company that such a fire had occurred, and the company advised such agent that an adjuster would give the matter attention as soon as he could do so consistently with other duties, and the local agent so notified the assured, and within a few days thereafter stated to the assured that an adjuster would be there on a day named, and for the assured to get his appraiser ready, held, that such agent had no authority to waive proofs of loss, and, further, that the above facts did not constitute a waiver of proofs. *Harrison v. Hartford Fire Ins. Co.*, 59 Fed. Rep. 732.

Waiver of defects or delay in proofs of loss submitted.—Where there are defects in the proofs of loss, whether formal, substantial, or, indeed, in any respect, which could have been supplied if specific objections had been made thereto by the underwriters, a failure on their part to object to the proofs on that ground, or to point out the specific defect, or call for information omitted within a reasonable time, is considered a waiver, however defective, informal or insufficient such proofs may be. *Peet v. Dakota Fire & M. Ins. Co.*, 1 S. D. 462; 47 N. W. Rep. 532.

Plaintiff wrote an insurance company four days after the burning of a building, notifying it of the loss, and stating that he had no knowledge of the particulars or origin of the fire. Receiving no reply, he wrote again in about fifteen days, calling attention to his former letter, and asking if there was anything lacking on his part. A reply was promptly returned, advising him that the officers of the company had expected to have some one visit the place of the loss before, but that they had been very busy, and that they would endeavor to do their part in the matter as soon as possible. They made no objection that the notice contained in the plaintiff's letters was not suffi-

cient, or that it was not accompanied by the affidavit required by the policy and by the statute. The adjuster came, and, after investigating the origin of the fire, urged the local agent to settle, if possible, for less than the amount insured. Held, that further notice or proof was waived. *Green v. Des Moines Fire Ins. Co.*, 84 Iowa, 135; 50 N. W. Rep. 558.

A policy of fire insurance provided that a loss should be paid sixty days after notice and proofs; that the amount should be appraised in a certain manner, and the appraisers' report should be made part of the proofs of loss; and until such proofs should be produced and appraisals permitted the loss should not be payable. Proofs of loss were furnished by the insured, to which the insurer objected because of the amount claimed. After negotiations between the parties concerning the manner of appraisal, the insured promised to submit a form of appraisal, which it failed to do, but retained the proofs for over sixty days. Held, that the insurer could not afterwards object to the sufficiency of the proofs. *Severens*, District Judge, dissenting. 46 Fed. Rep. 42, affirmed. *Connecticut Fire Ins. Co. v. Hamilton*, (Ct. of App.) 59 Fed. Rep. 258.

Where proofs of loss are retained by the company without objection, defects therein will be regarded as waived. *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112; 51 N. W. Rep. 1122; *Capitol Ins. Co. v. Wallace*, 50 Kans. 453; 31 Pac. Rep. 1070; *Carpenter v. Allemania Fire Ins. Co.*, 156 Penn. St. 37; 26 Atl. Rep. 781; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; 21 S. W. Rep. 207.

An insurance company, by retaining the proofs of loss for eighty-six days without objection, waives the fact that they were delivered a few days late. *Weiss v. American Fire Ins. Co.*, 148 Penn. St. 349; 23 Atl. Rep. 991. To same effect: *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77; 10 South. Rep. 355.

The insistence of an insurance company to examine insured after receiving proofs of loss is a waiver of any objection to such proofs founded on the delay in furnishing them. *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298; 31 N. E. Rep. 1015.

Where proof of loss is furnished to the insurance company, to which it objects, it must return the same, with its objections, within a reasonable time, or its objections will be unavailing. *Union Ins. Co. v. Barwick*, 36 Neb. 223; 54 N. W. Rep. 519.

Soon after a fire an insurance company's adjusting agent took from the insured a statement, sworn and subscribed to by her, of the property destroyed and its value. The agent referred to the statement as "proofs of loss," and told insured that nothing more was required, and afterwards offered to settle for a portion of the loss. Held, that the company had waived formal proofs of loss. *Wright v. Fire Ins. Assn.*, 12 Mon. 471; 31 Pac. Rep. 87. See, also, *Phoenix Ins. Co. v. Munger*, 49 Kans. 178; 30 Pac. Rep. 120.

35. Parties to action on policy.—A business man, having insured his stock of goods for \$4,000, made a formal assignment of the policies, with the consent of the insurers, to one B., to secure a contingent liability as indorser on his notes. He also executed a chattel mortgage on his goods for the same purpose. The notes were paid by the maker, and B. released from liability on the notes. In an action on the policies for a loss, held, that it was properly

brought in the name of the insured. *Union Ins. Co. v. Barwick*, 36 Neb. 223; 54 N. W. Rep. 519.

Where an insurance policy covers both real and personal property, and the personal property is conveyed to another, an assignment of the policy, so far as relates to the latter, made with the consent of the insurer, is valid, and thereafter the assignee may recover on the policy for loss of the personalty; and the assignor, for a loss on the real estate. *Bullman v. North British & Merchants' Ins. Co.*, 159 Mass. 118; 84 N. E. Rep. 169.

In an action on two policies of insurance, it appeared that one policy was issued to plaintiff and one Webb, each owning in severalty their respective shares; the other to plaintiff alone. No part of the property of Webb was destroyed. Held, that plaintiff, in her sole name, could join both policies in one action. *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514; 53 N. W. Rep. 818.

In an action on a policy of insurance in favor of a partnership the complaint alleged that plaintiff was receiver of the firm, appointed by order of court in a case of B. and others against the firm, with authority to reduce into his possession, by suit or otherwise, all the assets and choses in action of said firm. Defendant demurred, and alleged (1) that plaintiff had no legal capacity to sue; and (2) that there was a defect of parties plaintiff in the omission of the names of the members of the firm. Held, that the court properly overruled the demurrer, since, if plaintiff was receiver, and had authority to sue, he had capacity to sue, and, in such event the members of the firm were unnecessary parties. *Boyd v. Royal Ins. Co.*, 111 N. C. 372; 16 S. E. Rep. 389. Where it appeared that the record of the case referred to disclosed that plaintiff was not appointed receiver, but was, by consent, allowed to continue to manage the affairs of the firm, as he had been doing before the suit, on account of a disagreement between the partners, the plaintiff could not maintain the action, since he was not a receiver, a real party in interest, or a trustee of an express trust. *Ibid.*

The person to whom the loss is made payable may maintain an action in his own name for the amount of the loss, where the value of his interest in the property exceeds such amount. *West Coast Lumber Co. v. State Investment & Ins. Co.*, 98 Cal. 502; 33 Pac. Rep. 258.

Where the mortgagor assigned a policy of insurance to the mortgagee as part security for the mortgage debt, upon the satisfaction of the mortgage, he becomes subrogated to the rights of the mortgagee in the policy, and may maintain an action thereon for a loss. *Billings v. German Ins. Co.*, 34 Neb. 502; 52 N. W. Rep. 397.

36. Pleading and evidence.—An insurance company issued a policy, one item of which was "against all direct loss or damage (excepting all losses caused directly or indirectly by fire or lightning) to the property" of the insured. Held, that a declaration attempting to state a cause of action under said item, without stating that the loss was not caused, directly or indirectly, by fire, was demurrable. *Western Refrigerator Co. v. American Casualty Ins. Co.*, 51 Fed. Rep. 155.

In an action on a fire insurance policy conditioned that the company shall not be liable for loss by theft, defendant cannot rely as a defense on evidence of theft brought out without objection, unless the issue of theft is made by

the pleadings. *Hong Sling v. Scottish Union Nat. Ins. Co.*, 7 Utah, 441; 27 Pac. Rep. 170.

In an action on a fire policy, destruction of the property by the owner is a defense which cannot be proven unless specially pleaded, even though the complaint avers that the destruction was without any fraud, negligence, procurement or privity of his. *Morley v. Liverpool, L. & G. Ins. Co.*, 92 Mich. 590; 52 N. W. Rep. 939.

37. Property and risks covered by the policy.—A policy of insurance upon certain farm property included stables and "hay therein or in stack," and designated the property as being in the possession of the assured, who was referred to as residing on land (a farm) particularly described. Held, that the policy covered hay in stack situate off the land so described, and two miles distant from the residence of the assured, although the articles of incorporation declared that only property under the "immediate control" of the assured should be subject to insurance. The agent of the company who effected the insurance, and made out the description of property inserted in the policy, knew of this hay, and, as between him and the assured, it was understood that it was to be covered by the policy. *Soli v. Farmers' Mut. Ins. Co.*, 51 Minn. 24; 52 N. W. Rep. 979.

In an action on a policy of insurance on grain "contained in the elevator of the O. T. Co. at O.," it appeared that the O. T. Co. operated two elevators at O., one as lessee and the other as owner; that plaintiff's grain was in the elevator operated under the lease; that the application for the insurance was made on September eighth, but the policy was not written till about noon on the day following; that in the forenoon of the day on which the policy was written the elevator in which plaintiff's grain was stored was burned, and the agent who afterwards wrote the policy had actual notice of the burning. Held, that the policy was not intended to cover grain in the elevator which had been burned at the time the policy issued. *Mead v. Phoenix Ins. Co.*, 158 Mass. 124; 82 N. E. Rep. 945. In such case, the fact that the two elevators were connected by a belt gallery 400 feet long would not justify a jury in finding that the insurance covered both buildings. *Ibid.*

An insurance policy covering a two-story brick dwelling house, "and its additions adjoining and communicating," embraces a frame addition adjoining and communicating with the brick building. *Carpenter v. Allemania Fire Ins. Co.*, 156 Penn. St. 37; 26 Atl. Rep. 781.

In an action upon a policy insuring building, machinery, dynamos and other electrical fixtures of an electric company, it appeared that the fire produced a short circuit in the wires connecting with machinery in a part of the building remote from the fire, and that such short circuit caused such a strain on the machinery as to break it to pieces. Held, that the fire was the direct cause of the damage to the machinery. *Lynn Gas & El. Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570; 33 N. E. Rep. 690.

38. Loss by explosion.—Where an insurance policy provides that the insurer shall not be liable for loss caused by "explosion of any kind, unless fire ensues, and then for the loss or damage by fire only," no liability exists for damage done by an explosion produced by the ignition of a match in a room filled with illuminating gas, since the explosion of the gas, and not the

lighting of the match, is the proximate cause of the loss. *Hener v. Northwestern Nat. Ins. Co.*, 144 Ill. 393; 83 N. E. Rep. 411.

39. Harvesting machine while operating or in transit.—In an action on a fire insurance policy on a harvesting machine while “operating in the grain fields, and in transit from place to place in connection with harvesting, in” a certain county, it appeared that the machine was moved, the day after the policy was issued, from the place where it had been stored since the previous harvesting season, to a blacksmith shop, to be repaired in order to fill contracts for cutting grain. While near such shop, eight days after being taken thereto, and about the day the harvesting season commenced, the machine was burned. Held, that it was not “operating in grain fields,” or “in transit from place to place in connection with harvesting,” at the time it was destroyed. *Paterson, Garoutte and McFarland, JJ.*, dissenting. *Mawbinney v. Southern Ins. Co.*, 98 Cal. 184; 32 Pac. Rep. 945. To same effect: *Benicia Agricultural Works v. Germania Ins. Co.*, 97 Cal. 468; 32 Pac. Rep. 512.

40. Subrogation.—An insurer of a carrier against loss of cargo, under a policy for the benefit of whom it may concern, is not subrogated to the shipper's rights against the carrier by reason of paying the loss to the shipper, upon the carrier's order; nor does any right of subrogation arise by reason of the fact that the carrier attached the insurance certificate to the bill of lading, and delivered it therewith to the shipper on receiving the cargo. *Wager v. Providence Ins. Co.*, 150 U. S. 99; 14 Sup. Ct. Rep. 55.

41. Waiver of conditions in policy—power of agents.—Where a fire insurance policy provides that no agent of the company shall be held to have waived any of the conditions of the policy “unless such waiver shall be indorsed hereon in writing,” it is error to admit oral evidence of a waiver of a forfeiture by the local agent of the company. *Carey v. German-American Ins. Co.*, 84 Wis. 80; 54 N. W. Rep. 18.

An agreement between an insurance company and an agent recited that the latter agreed to devote his whole time to the service of the company, under instructions to be issued from time to time, indicated the territory in which he was to work, and specified the amount of his compensation. A document of later date gave him authority to receive applications for insurance under instructions from the company. Held, that he was not a general agent, and had no authority to waive a condition against incumbering property insured. *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516; 51 N. W. Rep. 29.

A policy of insurance provided that it should be void if the insured should procure other insurance on the property, and that no officer or agent could waive such condition except by indorsement on the policy. The insured, having obtained other insurance, informed the agent who had issued the policy to him, and the latter said that he would “attend to it,” but failed to do so. The insured did not then have the policy with him, nor did he afterwards apply to the agent for the written consent to the other insurance required by the policy. Held, that the agent's promise did not constitute a waiver of the conditions nor affect the right of the company to insist on a forfeiture. 15 N. Y. Supp. 573, reversed. *Baumgartel v. Providence Washington Ins. Co.*, 136 N. Y. 547; 32 N. E. Rep. 990. To same effect: *Moore v. Hanover Fire Ins. Co.*, 141 N. Y. 219; 36 N. E. Rep. 191.

A fire insurance policy on a house on leased land was made in the name of the lessee, with a provision that loss, if any, under same, should be payable to another person, as his interest might appear. The lessee surrendered the property to the owner, and the person to whom the loss was made payable notified the agent of the insurance company of the surrender by the lessee, and was informed by the agent that no change in the policy was necessary because of the same. Held, that the insurance company thereby waived a provision in the policy that the same should be void if, without the consent of the company indorsed thereon, there should be any change in the title or possession of the property. *West Coast Lumber Co. v. State Investment & Ins. Co.*, 98 Cal. 502 ; 83 Pac. Rep. 258.

Where the agent of defendant insurance company, clothed with full power to issue policies, and who was also the legal adviser of plaintiff, and knew the condition of her property, procured and assented to the placing of a chattel mortgage on the property, but did not indorse such assent on the policy, the defendant insurance company is estopped from denying its liability under the policy, it being presumed to have the knowledge of its agent, even though the policy contained a provision that it would be void if the property became incumbered by a chattel mortgage, unless assent was indorsed thereon, and the further provision that no agent had power to waive a provision or condition. *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514 ; 53 N. E. Rep. 818.

The general agent of an insurance company that had issued a policy which forbade additional insurance without its consent, on being informed that additional insurance had been procured, replied : " We must be understood as positively declining to permit the other insurance," adding, " We cannot permit the other insurance without information." The desired information was given, but the agent made no further response, and kept the policy without canceling it. Held, that this was sufficient to justify a finding that the company had waived the requirement about additional insurance. 42 Ill. App. 66, affirmed. *Phoenix Ins. Co. v. Johnston*, 143 Ill. 106 ; 32 N. E. Rep. 429.

A fire insurance company, at the instance of a local agent, makes out for a country merchant, who has no iron safe in his store, a policy with, among others, the following clause : " It is expressly stipulated that the assured shall take an inventory of the stock hereby covered at least once a year, and shall keep books of account correctly detailing purchases and sales of both said stock for cash and credit, and shall keep said inventory and books securely locked in an iron safe during the hours such store is closed for business." " Failure to observe any of these conditions shall work a forfeiture of all claims under this policy." The company sends such policy to the said local agent to be delivered. The agent, before he delivers the policy, tells the merchant that instead of such iron safe he can keep said books and papers at his dwelling house, to post at night, and for safety. The merchant accepts the policy on such condition, and pays the premium, and the company is notified thereof, and makes no objection. The storehouse is burned in the night, but the books are saved at the merchant's dwelling. The secretary and agent come on the ground to examine and adjust the loss. The books, etc., thus preserved are exhibited to them for inspection. He says : " The house is insured too high, but I do not object to the insurance on the goods." Suit is

afterwards brought by the assured on the policy for the insurance. Held, under such circumstances, the company is estopped to set up such failure to observe such condition as working a forfeiture of all claims under the policy. *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272; 16 S. E. Rep. 580.

Where a condition formed no part of the policy, as originally written, but was written on a separate piece of paper, and attached to the policy, by agents who had authority to issue the policy either with or without the condition, the condition may be orally waived by such agents, in spite of a provision in the policy that no waiver shall be binding unless written upon the policy. *Manufacturers & Merchants' Mut. Ins. Co. v. Armstrong*, 145 Ill. 469; 34 N. E. Rep. 553.

42. Waiver of condition may be proven under averment of performance.—Where, in an action on an insurance policy, the petition alleges that all of the conditions of the policy have been complied with, proof of waiver by defendant of proofs of loss is admissible, and is proof of performance within the meaning of the policy. *McCullough v. Phoenix Ins. Co.*, 118 Mo. 606; 21 S. W. Rep. 207.

43. Waiver of condition—effect of issuing policy with knowledge or notice of facts in violation of condition.—An insurance policy on plaintiff's lumber contained a warranty by the assured that a clear space of 150 feet should be maintained between the property insured and any wood-working or manufacturing establishment, any violation of this warranty to render the policy null and void. Held, in a suit on the policy, that defendant is estopped from avoiding the same for deficiency of clear space, where its agent, when he wrote the policy, knew the condition of the insured property, and that a clear space of 150 feet actual measurement did not exist, and that plaintiff could not control a clear space for that distance, and the agent decided that such clear space, in consideration of the situation of the property insured, was equivalent to 150 feet as ordinarily understood, and fixed the rate accordingly, accepted the premium, and knew that no change was made by the insured, and took no steps to cancel the policy. *Grant and Montgomery, JJ., dissenting. Michigan Shingle Co. v. State Investment & Ins. Co.*, 94 Mich. 889; 53 N. W. Rep. 945.

Where an insurance company had notice at the time its policy was issued of the existence of additional insurance on the property, it is estopped, in an action on the policy, from setting up a violation of a clause therein prohibiting prior additional insurance without its assent. *Reed v. Equitable Fire & M. Ins. Co.*, 17 R. I. 785; 24 Atl. Rep. 833. Notice to the agent of an insurance company, at the time a policy is issued, of the existence of prior insurance, is not sufficient to constitute a waiver by the company of a condition in the policy prohibiting additional insurance without the company's assent, unless the agent is a general agent, with full power to make contracts of insurance, and not a mere agent to receive applications and forward them to the company. *Ibid.*

Plaintiff's insurance policy provided that, if insured is not the "sole, absolute and unconditional owner of the property insured, or if said property be a building and the insured be not the owner of the land on which it stands by

title in fee simple, and this fact is not expressed in the written portion of the policy," it should be void. Held, that the policy was not void under the condition, though plaintiff's title to the realty on which the insured building stood was only a contract of purchase, and that fact did not appear in the policy, where the insurance was placed by a solicitor employed by defendant's agent, and plaintiff informed such solicitor of the condition of his title. *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298; 31 N. E. Rep. 1015.

Where the widow of a decedent insures property for the benefit of the heirs a representation by her that it was unincumbered does not avoid the policy where the agent of defendant company, at the time he issued the policy and accepted the premium from her in behalf of defendant company, had full knowledge of the fact that she had a dower interest in the property insured. *Haire v. Ohio Farmers' Ins. Co.*, 93 Mich. 481; 53 N. W. Rep. 628. See, also, *Ahlberg v. German Ins. Co.*, 94 Mich. 259; 53 N. W. Rep. 1102.

A policy issued upon a warehouse provided that if the building stood on leased ground it must be so represented to defendant, and expressed in writing in the policy, otherwise the insurance as to such property would be void. There was evidence that defendant's agent knew that the warehouse was on leased land. Held, that the court properly refused to charge that, if such fact was not stated in writing in the policy, plaintiff could not recover. *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213; 15 S. E. Rep. 562. To same effect: *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; 33 N. E. Rep. 475.

44. Waiver of condition — effect of issuing policy without information or inquiry, when facts exist which constitute a violation of policy.—Where defendants issued the policies of insurance on verbal applications, and asked no questions except as to the amount of insurance wanted, the property to be insured and its location, and the insured made no misrepresentations, defendants cannot escape liability on the ground that facts existed which materially affected the risk, and the policies provided that failure to make known any facts material to the risk would render the policies void. *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213; 15 S. E. Rep. 562. To same effect: *Peet v. Dakota Fire & M. Ins. Co.*, 1 S. D. 462; 47 N. W. Rep. 532.

Where a clause of an insurance policy provided that the entire policy should be void if the assured had or should procure other insurance, or incumber the property by mortgage, the existence of a mortgage and prior insurance on the insured property invalidated such policy, though the assured was not examined as to whether his property was incumbered, or verbally informed of the effect of such prior insurance or incumbrance by defendant, such facts not constituting a waiver of the condition. *Wilcox v. Continental Ins. Co.*, 85 Wis. 193; 55 N. W. Rep. 188.

45. Waiver of forfeiture.—After the dwelling house and part of its contents was burned, the company's directors passed a resolution disallowing assured's claim on account of the dwelling house having been unoccupied. The annual meeting of the company, being advised of this action, did not disapprove of it. The directors, however, reported to the same meeting a list of outstanding valid policies, and among them the policy on the dwelling house, barns, etc., for the full amount thereof, and no objection was made to its

validity, nor suggestion that it be forfeited. At the next following annual meeting it was again reported as a valid policy, without question. Thereafter an assessment was made on all outstanding policies, and this policy was assessed with the others to the full amount thereof. Assured was notified to pay the assessment, and did so, and the payment, with others, being reported to the directors, they made no objection thereto, or attempt to refund the money, until after action brought for the loss to the dwelling house. Held, that the acts and omissions of the company and its directors were inconsistent with the claim of forfeiture of the policy, and that it was estopped to deny its validity. *Dohlantry v. Blue Mounds Fire & L. Ins. Co.*, 83 Wis. 181; 53 N. W. Rep. 448.

A policy of insurance provided that, upon the failure of the insured to pay the premium note therein described in full, at maturity, such policy should cease to be in force, and continue null and void while said note remained unpaid. Said note not having been paid at maturity, the insurance company accepted as a credit thereon an amount of money largely in excess of the premium earned, and left the note with its local agent for collection. Subsequently, and before the premium so paid had been earned, and before the note had been paid in full, the property insured was destroyed by fire. Held, that the policy was voidable only at the election of the insurance company, and that, by receiving and retaining the part payment after default, and retaining the note for collection, it waived the right to insist upon a forfeiture thereof. *Phoenix Ins. Co. v. Dungan*, 37 Neb. 468; 55 N. W. Rep. 1069.

A forfeiture of an insurance policy by reason of a violation of its condition by the insured is waived by the company, where, after full knowledge of the facts, it requires him, not only to make proofs of loss, but causes him to go to the expense of making additional proof, and of furnishing plans and specifications of the building destroyed. *Replogle v. American Ins. Co.*, 132 Ind. 360; 31 N. E. Rep. 947.

A forfeiture in a policy of insurance may be waived where the insurer is informed of the facts out of which a forfeiture is claimed, but thereafter continues to treat the contract as binding, and induces the insured to act in that belief. *Billings v. German Ins. Co.*, 34 Neb. 502; 52 N. W. Rep. 397.

The conditions of an insurance policy rendered it void if the insured obtained additional insurance in excess of \$18,000, and provided that, in case of loss, copies should be given of the written portions of all policies for additional insurance. The proof of loss showed \$24,000 additional insurance, but stated there had been no violations of the conditions of the policy. Defendant received information of the excess from its agent, and required plaintiffs to furnish additional proofs, giving copies of the written portions of all other policies on the property, which he did, at an expense of twenty-five dollars. Held, that this did not bring the case within the rule that if an insurance company, during transactions or negotiations after knowledge of forfeiture, recognizes the policy as valid and subsisting, and requires the insured to incur trouble or expense, it thereby waives the forfeiture. *Antes v. Western Ass. Co.*, 84 Iowa, 355; 51 N. W. Rep. 7.

The forfeiture of a policy is not waived by the adjuster and state agent of the company eleven days after the fire stating that he would refer the

matter to the company, where he at the same time claims that the company is not liable on the policy. *Barr v. German Ins. Co.*, 84 Wis. 76; 54 N. W. Rep. 22. See, also, *Manufacturers & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469; 84 N. E. Rep. 553.

Where a change takes place in the possession of the property insured "by legal process," in violation of the terms of the policy of insurance, the policy is forfeited, and the forfeiture cannot be waived by the local agent of the company who negotiated the insurance, unless the waiver is indorsed on the policy in writing, as required by the policy. *Carey v. Insurance Co.*, (Wis.) 54 N. W. Rep. 18, followed. *Carey v. Phoenix Ins. Co.*, 84 Wis. 208; 54 N. W. Rep. 403.

46. Waiver of defense.—A loss on a policy occurred August, 1888. In October the company notified plaintiff that it denied all liability on the policy. In November a clerk in defendant's office, in the usual course of business, notified plaintiff that his premium note was due, and asked him to remit, which he did. The company, by its officers, at once offered to return the same, and notified plaintiff that it was subject to his order. Held, not a waiver of any defense to the policy. *Ryan v. Rockford Ins. Co.*, 85 Wis. 573; 55 N. W. Rep. 1025.

47. Miscellaneous.—Though Howard's Statutes of Michigan, section 4349, declare void all insurance policies containing other or different terms than those expressed in the Michigan standard policy, it is no defense to an action on a policy by an insured that it contains a clause not contemplated by the act, as the purpose of the act is the protection of policyholders. *Armstrong v. Western Manufacturers' Mut. Ins. Co.*, 95 Mich. 137; 54 N. W. Rep. 637.

Where a person, acting in good faith, obtains an insurance policy without actual notice that the insurance company has failed to file the statement required of foreign insurance companies by Revised Statutes of 1887, chapter 78, section 124, as a prerequisite to doing business in Illinois, the company when sued on the policy is estopped from denying its authority to issue such policy. *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85; 30 N. E. Rep. 772.

Where an insurance was several times renewed without issuing a new policy and then was renewed by a new policy, it is the duty of the insured to take notice of any change of the conditions in the policy. *Thomson v. Southern Mut. Ins. Co.*, 90 Ga. 78; 15 S. E. Rep. 652.

In a policy of insurance the house insured was described as "occupied as a sporting house." Held that, as the term "sporting house" has an innocent as well as guilty meaning, it cannot be said, without proof of the sense in which it was used, that the policy shows conclusively that the occupancy of the house was for unlawful purposes. *White v. Western Ass. Co.*, 52 Minn. 352; 54 N. W. Rep. 195.

DAILEY V. PREFERRED MASONIC MUT. ACC. ASSN. OF AMERICA.

(Supreme Court of Michigan, January 5, 1894.)

1. ACCIDENT INSURANCE. WAIVER OF CONDITIONS IN POLICY. Where a solicitor of accident insurance, knowing that a person already has insurance in another company, informs the secretary of his company thereof, and is instructed by the secretary to solicit insurance of him notwithstanding this, the fact that the solicitor states in the application that applicant has no other insurance will not avoid the policy, the right to have it forfeited by reason thereof being waived.

2. COMPLETION OF CONTRACT. DELIVERY. Where an application is accepted and credit given for the premium, the contract of insurance is complete, and the fact that the policy, sent by mail, does not reach its destination until after the assured's death does not prevent a recovery thereon.

3. CONTRACT MADE BY THE APPLICATION AND ITS ACCEPTANCE MAY BE ENFORCED AND POLICY IGNORED. Where an application for accident insurance states that applicant is a conductor on a passenger train, and contains nothing indicating that the policy will have any restriction against entering and leaving moving trains, such risks will be held to be insured against; and if action is brought on the contract made by the application and its acceptance, recovery may be had for an accident caused by such risk, though it is excluded by the policy.

4. WHEN ACTION IS ON THE POLICY, THE POLICY GOVERNS. Where, however, action is brought on the policy, and the accident, though alleged not to have happened from such risk, is shown to have been so caused, recovery cannot be had.

Frank T. Lodge (*Edwin F. Conely*, of counsel), for appellant.
Wm. E. Baubie (*Russel & Campbell*, of counsel), for appellee.

LONG, J. This action is brought upon a benefit and indemnity certificate of \$5,000, issued by the defendant upon the life of Arthur H. Dailey, a conductor on the Michigan Central railroad, and a brother of the plaintiff, who was named as beneficiary therein. The maximum indemnity in case of injury was twenty-five dollars per week. The cause was tried before a jury, resulting in a verdict and judgment for plaintiff for the amount of the policy and interest. The record shows that the deceased made an application for the insurance in writing on January 16, 1891. It was filled out by Mr. McBride, a solicitor for the defendant, upon a blank form provided and furnished for that purpose. In answer to the question contained in the application: "Have you other accident insurance covering weekly indemnity? If so, give names of companies, and amount of weekly indemnity in each,"

McBride filled in the answer, "No." And in answer to the question: "Does the weekly indemnity you now carry, and the amount you now apply for exceed your weekly salary, wages or income? If so, how much? Answer fully," McBride filled in the answer, "No." The testimony tends to show that, at the time of signing the application, Dailey explained to McBride that he had other insurance, which, with that proposed to be taken in the defendant company, would make the weekly indemnity exceed his wages. McBride induced him to agree to drop this other insurance when it expired, upon the first of March following, and assured him that the statements in the application would make no difference as to the validity of the insurance he would give him; that he agreed also to give Dailey credit for the premium until February first. Mr. McBride testified that Mr. Miller, the secretary of the company, was advised of the fact that Dailey had other insurance, and that he did not desire to pay until the end of the month. January nineteenth, Mr. Miller, as secretary, indorsed an acceptance upon the application. January twenty-fourth a policy was filled out, and properly executed by the president and secretary, under the seal of the company, and mailed to Dailey. The same date, about two or three hours after the policy was mailed to him, Dailey was run over by his train and injured, so that he died the following day. He never saw the policy, which was delivered at his residence in the regular course of mail. The premium required by the company was afterwards tendered and refused. Mr. McBride testified on the trial that he informed Miller, the secretary, of all the facts, and that Miller agreed to charge him with the premium, and issue the policy at once. McBride says: "I had told Miller that Dailey was going to let his other insurance run out, and he has promised to let me write him up as soon as his other insurance runs out." Miller said: "You get it as soon as you can. We want it, and he may not see you when it runs out, and get another year's insurance in some other company." Mr. Miller does not deny that he was informed of the other insurance, and of Dailey's wish not to pay the premium at once. He says, however, that he did not agree to issue the policy and give credit for the premium. He did fill out the policy, however, and dated it back to the date of the application, January sixteenth, but claims that he instructed his

cashier not to deliver it until March first, when the premium would be collected.

1. The defense claims that the policy was not operative at the time of Dailey's death, for the reason that it had not been delivered; that it was sent to applicant's house by mistake; that the advance premium had not been paid; and that it was agreed that it should not be operative until March 1, 1891. The court instructed the jury substantially that if the policy was filled out by the secretary with intent to have it take immediate effect, he knowing of the other insurance and of the agreement to give credit for the premium, and that it was mailed to the deceased with intent to have it take immediate effect, the plaintiff could recover; but, on the other hand, if the secretary indorsed it to take effect on the first of March, when the other policy expired, and the secretary did not agree to extend credit for the premium, and the policy was mailed to the deceased by mistake of the cashier, and against the instructions of the secretary, the plaintiff would not be entitled to recover. The court further charged the jury "if they believed the statements as to the other insurance contained in the application were made under the direction of McBride, after he had been fully informed of the facts, and the answers were written in by McBride, after being so informed, the defendant would be bound by the acts of McBride, as he was the agent of the company." We think there was testimony in the case to sustain those instructions. McBride says he knew of the other insurance, and the amount of it, and when it would expire. He testifies that he advised the secretary of it, and in fact solicited the insurance under the advice of the secretary. If so, then, notwithstanding the answers in the application were not truthfully made, the company could not avoid the policy. The knowledge of McBride and the secretary was the knowledge of the company, and the company must be held to have waived the right to insist upon the other insurance as a forfeiture. Under such circumstances it is not in a position to assert that the answers are untrue. *Pudritsky v. Lodge*, 76 Mich. 428; 43 N. W. Rep. 373. The court was not in error in the charge as to the extension of time to pay the premium, and the delivery of the policy, to take immediate effect. If the secretary, knowing all the facts, filled out the policy with intent

to have it take immediate effect, and caused it to be mailed to the deceased as of force and effect at that time, the company cannot now be heard to say that there was no delivery, though it did not reach its destination until after the death of the insured. If these facts were true, the beneficiary could have enforced a delivery of the policy if delivery had been refused. The contract was complete when the application was accepted and credit given for the premium. May Ins. § 46. It is contended that the court was in error in directing the jury that Mr. McBride was the agent of the company, and that the company would be bound by his acts in writing in the answers to the questions in the application. We think the court was not in error in this part of the charge. Mr. McBride was given authority to take the application, and it appears that he was sent by the secretary for the very purpose of obtaining the application, the secretary knowing at that time that Dailey had other insurance.

2. Another question in the case relates to a certain condition in the policy. The policy recites: "The conditions under which this certificate is issued, and to which the insured by his acceptance hereof agrees, are as follows: Standing or walking on the roadbed or bridge of any railway, or attempting to enter or leave moving conveyances using steam, electricity, water or compressed air as a motive power are hazards not covered by this insurance, and no sum will be paid for injuries or death in consequence of such exposure, or while the insured is thus exposed." The application upon which this policy was issued is set out in the record, and is entitled "Application for Membership in the Preferred Masonic Mutual Association of America," and states: "I hereby apply for membership in the above association, membership to be based upon the following statement of facts, which I hereby warrant to be true, and agree to accept certificate of membership subject to all its conditions and provisions." The blank form of application is numbered with questions and answers from 1 to 20 inclusive. No. 4 is as follows in question and answer: Question: "Place and business." Answer: "M. C. Ry. Co., Detroit." No. 6: "Occupation." Answer: "Passenger conductor M. C. Ry." No. 7: "What are the duties required of you in these occupations? Answer fully." Answer: "Running passenger train." No. 8: "Name and line of business of firm of which

you are a member, or by whom you are employed." Answer: "M. C. Ry. Co." No. 15: "Have you in contemplation any special journey or hazardous undertaking, not stated in this application for indemnity?" Answer: "No." No. 16: "Are you aware that the benefits from this association will not extend to nor cover hernia, orchitis, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to death or disability caused wholly or in part by bodily infirmities or disease, or by the taking of poison in any form or manner, or by any surgical operation or medical or mechanical treatment, nor to any cause except when the accidental injury shall be caused by external and accidental violence, and that these shall be the proximate and sole cause of disability or death?" Answer: "Yes." No. 17: "Are your habits of life correct and temperate, and do you understand that the certificate of insurance will not cover any injury which may happen to you while under the influence of intoxicating drinks, or in consequence of having been under the influence thereof?" Answer: "Yes." No. 18: "Are you aware that any misstatement or concealment of facts by you, or the omission or neglect to pay within thirty days from the date of notice the quarter annual fee, or any of the assessments made by the association upon you, will work a forfeiture of all the claims you or your heirs or legal representatives may have to any benefits arising from your connection with this association?" Answer: "Yes." "Applications for certificates are not binding until accepted by the secretary. No other person is authorized to bind the association. [Signed] A. H. Dailey. Accepted Jan. 19, 1891, 12 o'clock noon. A. C. M., Secretary. 3-1-91." Aside from the questions of other insurance, which have been before discussed, the foregoing contains substantially all there is in the application which Dailey signed.

It is contended that no recovery can be had under this policy, for the reason that the proofs show conclusively that Mr. Dailey came to his death while attempting to alight from his train when it was in motion, and that the direct cause of his injury and death resulting therefrom, was in attempting to alight from his train while in motion. The declaration avers that, "at the time said injuries were incurred by said Arthur H. Dailey as aforesaid,

he, the said Arthur H. Dailey, was not attempting to enter or leave a moving conveyance, as defined by said policy." It is contended by plaintiff (1) that there was some evidence from which the jury might find that the deceased did not meet his death from attempting to leave the train while in motion; (2) that under the application the insured was entitled to have a policy issued to him which did not contain these restrictions; (3) that under the application it is fairly to be inferred that an accident such as caused the death of Dailey was within the express risk against which it was assumed to insure; (4) that the restriction in the policy cuts out the probable accidental violence which, in the minds of both parties, Mr. Dailey, a railway passenger conductor, was insuring himself against; that the restriction would practically render the insurance nugatory and valueless, and that it must, therefore, be held inoperative so far as this insurance is concerned. There can be no doubt about the correctness of plaintiff's position when we take into account the answers given to the questions in the application, and had the action been brought upon the contract made by the acceptance of the application, no doubt could arise as to the plaintiff's right of recovery; but the declaration avers that the deceased did not come to his death by the attempt to leave the moving train. Failing to establish that fact, and it being shown by defendant that the proximate cause of the injury and death was the attempt to leave the train while in motion, it is now asserted that that was one of the very risks insured against, and plaintiff should be permitted to recover for that reason. We think there was no evidence from which the jury would have been warranted in finding that Dailey came to his death by any other means than in an attempt to leave the train while in motion. We are also satisfied from the application and the information which that gave to the defendant company that accidents of this kind are of the risks intended to be insured against. The sole business of the deceased was in running passenger trains, and this was plainly stated in the application. It is common knowledge that conductors of passenger trains on all railroads must, in the very nature of their business, not only enter but leave their trains before they come to a full stop. It is common knowledge that conductors of passenger trains have full charge of their trains. They give the signal to start, and

after the train starts they get on board. At stations when the train pulls up, and before it stops, the conductor alights upon the platform. This may be a dangerous practice, but it is among the risks which the passenger conductor assumes when he enters upon such employment, and so general is this knowledge that the defendant company, when it took and approved the application, must have had knowledge of it. In view of this, the above restriction in the policy cannot be insisted upon by the defendant company, and, if the declaration had been based upon the contract actually made, the questions here raised by plaintiff might be of avail. As before stated, the contract was complete when the application was accepted and credit given by the secretary for the premium. The insurance which the parties agreed upon is substantially set out in the application, and the insured had no reason to believe from it that there was to be any such restriction as to entering or leaving moving trains as contained in this policy. He was entitled to have a policy issued to him in conformity to the application, and if the suit had been planted on the contract of insurance such as the minds of the parties met upon, and the other facts were as found by the jury, there could be no doubt about the right of recovery. If it was the intent of the parties that the policy should issue at once when the application was accepted, and the application was accepted to take effect as of January nineteenth, so as to give the insured the same legal remedy which he would have had had the policy been delivered on that day, and that was the intent of the parties, the law will give effect to such intention. *Davenport v. Insurance Co.*, 17 Iowa, 276; *Perkins v. Insurance Co.*, 4 Cow. 646; *Tayloe v. Insurance Co.*, 9 How. 390. But as the declaration counts on the policy as the contract between the parties, and negatives the restrictive clause, and this not being proved, the action cannot, in its present form, be maintained, and the judgment of the court below must be reversed. New trial granted, with costs. The other justices concurred.*

ACCIDENT INSURANCE—RECENT DECISIONS.

1. Application — effect of untrue statement in, when agent knows facts.—An accident insurance company cannot escape its liability under a policy on the ground that the insured, who was deaf, signed an application

* Reported in 57 N. W. Rep. 184.

stating that he was not subject to any bodily infirmity, where it appeared that the company's agent who took the application had full knowledge of the insured's physical condition. *Follette v. United States Mut. Acc. Assn.*, 110 N. C. 377; 14 S. E. Rep. 923.

2. Application to be construed in insured's favor.—Where insured, while a boy, received injuries from which he recovered so that they did not increase his liability to accidental injury, or contribute to the accident which resulted in his death, his policy was not forfeited by a statement in his application that he had never been physically injured or subject to bodily or mental infirmity or disease, the insured being entitled to a liberal construction in his favor. *Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376; 33 N. E. Rep. 105.

3. Loss of both feet — policy construed.—Where a total paralysis of both legs results from an accident to insured, he has sustained a loss of both feet within the meaning of a policy. *Sheanon v. Pacific Mut. Life Ins. Co.*, 88 Wis. 507; 53 N. W. Rep. 878.

4. Notice and proofs of injury or death.—An accident policy of insurance, stipulating that failure to notify the company of an injury for the space of ten days after it is received shall bar all claim under the policy, is valid; and when such stipulation has neither been complied with nor waived the assured cannot recover upon the policy. *Heywood v. Maine Mut. Acc. Assn.*, 85 Maine, 289; 27 Atl. Rep. 154.

Where a condition in an accident insurance policy requires written notice to the insurer of any accidental injury to the insured "with full particulars of the accident and injury," and provides that "failure to give such notice within ten days from the date of either injury or death" shall invalidate all claims under the policy, the ten days in which to give notice do not begin to run until the fact of death, and the circumstances under which it occurred, have been ascertained. 23 N. Y. Supp. 173, affirmed. *Trippe v. Provident Fund Soc.*, 140 N. Y. 28; 85 N. E. Rep. 316. Where an administrator, with the implied consent of an accident indemnity association, adopts and relies upon the act of a third party, who has filed with such association proof of a claim growing out of the accidental killing of such administrator's intestate, a member of the association, the latter will not be allowed to defeat a recovery upon the ground that it was incumbent on the administrator to file the proof himself, or that he could not, with its implied consent, adopt as his own that filed by such third party. *Wilson v. Northwestern Mut. Acc. Assn.*, 53 Minn. 470; 55 N. W. Rep. 626.

An accident insurance policy provided that a failure to give immediate written notice of an accidental injury or death to the company at its home office should invalidate the policy. The beneficiary went to the office of the local agent to notify him, and left word with his clerk, whereupon the local agent notified the home office in writing. The home office thereupon had the case investigated by its officers, and its surgeon attended the post mortem examination of the insured. The notice to the local agent was given in May, and although the accident occurred in March, it did not appear to be serious until April. Held proper to submit to the jury the question whether written notice had been given within a reasonable time, and whether the company had

waived such notice. *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1; 18 S. W. Rep. 395.

5. Waiver of notice or proofs of injury or death.—A policy provided that no action should be brought on it until proofs of death should be received at the home office of the company. The evidence showed that the beneficiary had written three times to the home office, requesting blank forms for proof of death, and that each time the company had refused to act unless the beneficiary would sign an agreement admitting that she had failed to give immediate notice of the injury. Held proper to submit to the jury the question whether the company had waived proof of death. *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1; 18 S. W. Rep. 95.

In *Trippe v. Provident Fund Soc.*, 140 N. Y. 23; 35 N. E. Rep. 316, it was held that the insurer waived the condition requiring notice within ten days by retaining, without objection, a notice of the accidental death of insured, given more than ten days after such death, and a subsequent notice from the administrator of insured; by furnishing the necessary blanks for proof of loss; by retaining, without objection, the proofs made in compliance with the terms of the policy, and by subsequently calling for, and receiving, further information.

A denial of liability waives the provision as to notice and proofs of loss. *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507; 53 N. W. Rep. 878.

6. Limitation to bringing suit.—The holder of an accident policy that provides that suit thereon must be brought within a year from the time of the alleged accident, where he was notified five months before the expiration of the year by the company that it declined to pay his claim, and that "it would be better to let the courts decide this matter," cannot bring suit after the expiration of the year. *Law v. New England Mut. Acc. Assn.*, 94 Mich. 266; 53 N. W. Rep. 1104.

7. Company bound by agent's classification of insured's occupation.—Where an applicant for insurance against accident makes a true and full statement of his occupation to the company's agent, the company is bound, after loss, by the classification which the agent gives him; and if he is wrongly classified, according to the company's rules, the fact that he certifies to an understanding of the company's classification of risks, and that he belongs to the class given, is immaterial, when in fact his only means of understanding such classification is through the representations of the agent. *Pacific Mut. Life Ins. Co. v. Snowden*, 7 C. C. A. 264; 58 Fed. Rep. 342. To same effect: *New York Acc. Ins. Co. v. Clayton*, (Ct. of App.) 59 Fed. Rep. 559.

8. Exceptions to liability—voluntary exposure to danger.—The cleaning of a gun not known to be loaded and which is discharged on account of an unknown defect, is not a "voluntary exposure to unnecessary danger," within an accident policy. *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167; 21 S. W. Rep. 39.

"Voluntary exposure to unnecessary danger and hazardous or perilous adventure," in an accident insurance policy, exempting the insurer from liability for death produced from such exposure, means wanton or grossly imprudent exposure. *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 7 C. C. A. 581; 58 Fed. Rep. 945.

9. Injury from being on railroad — proof.—Plaintiff's intestate held an accident and death policy in defendant company, which provided that defendant would not be liable for injury resulting from, or attributable partially or wholly to his being upon a railroad bridge, trestle or roadbed. Decedent's dead body was found beside a railroad track, he having been last seen alive the evening before, and no one knew how or when he was killed. Held, where defendant did not deny that death resulted from accidental injuries, visible on deceased's person, that the jury were properly instructed that, to prevent a recovery, they must be satisfied that deceased broke the conditions of the policy. *Dougherty v. Pacific Mut. Life Ins. Co.*, 154 Penn. St. 385; 25 Atl. Rep. 739.

10. Death from falling into the water — whether accidental or the result of disease.—A drowning caused by a temporary trouble to which the insured was not subject, but which was entirely unusual and uncommon, whereby he fell into the water, is "accidental," within the meaning of an accident insurance policy. *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 7 C. C. A. 581; 58 Fed. Rep. 945. Under a provision of an accident insurance policy that the risk shall not extend "to any case except when the accidental injury shall be the proximate and sole cause of disability or death," if the insured suffer death by drowning the drowning is the proximate and sole cause of death, no matter what the cause of falling in the water, unless death would have been the result without the presence of the water. *Ibid.* Under a provision of such a policy that the risk shall not be extended to "accidental injuries or death resulting from or caused, directly or indirectly," by fits, vertigo or other disease, an accidental death by drowning results from and is caused indirectly by fits, vertigo or other disease, if the fall into the water from which drowning ensues is caused by such disease. *Ibid.* A provision in such a policy that the risk shall not extend to death caused by bodily infirmities or disease does not include fainting produced by indigestion or a lack of proper food, or any other cause which would show a mere temporary disturbance or enfeeblement. *Ibid.*

11. Exemptions must be specially pleaded to be available as a defense.—An exemption must be specially pleaded by the insurer before it can be made available as a defense, and if it be not pleaded the court may exclude any evidence offered to establish the rule which it is claimed has been violated. *Standard Life & Acc. Ins. Co. v. Jones*, 94 Ala. 434; 10 South. Rep. 530.

CARPENTER V. UNITED STATES LIFE INS. CO. OF NEW YORK.

(Supreme Court of Pennsylvania, April 2, 1894.)

LIFE INSURANCE. INSURABLE INTEREST. One has an insurable interest in the life of another who, out of friendship, and without any bonds of kinship, has assumed the position of father to him.

ACTION by Adaline Carpenter against the United States Life Insurance Company of New York. A nonsuit was granted and plaintiff appeals.

Watson & McLean, for appellant. *S. J. Strauss, Addison Candor* and *C. La Rue Munson*, for appellee.

DEAN, J. Alanson B. Tyrell, a man about sixty years of age, living with his family near Wilkes Barre, had in his house, as a domestic, a poor girl named Adaline Carpenter. So far as appears from the evidence, prompted solely by a benevolent and kindly disposition, this old man befriended this girl, sent her to school and paid her expenses. In return she at times, for small wages, performed some services for him, such as keeping his books and copying his letters. He was a designer and builder of coal breakers, and seems to have had considerable business. On the 10th of December, 1892, he took out a policy of insurance on his life, in the sum of \$2,000, payable to himself, in the defendant company. He paid the first annual premium, \$104.84. Thirteen days thereafter, on the twenty-third of the same month, he assigned the policy, in writing, to Adaline Carpenter, sealed it in a package and delivered it to her with the injunction not to open it until after his death. Notice of the assignment, as provided by the policy, was duly given the company, and, without objection, acknowledgment of the notice was made by indorsement on a duplicate. On April 1, 1893, Tyrell died. Adaline Carpenter inspected the package delivered to her, found in it the policy regularly assigned to her, and made proper proof of the death of the insured, and demand for payment. The company, on the ground that the policy was a wagering contract, refused payment. Thereupon, this suit was brought, and the learned judge of the court below, holding that, so far as concerned this plaintiff, the contract was a wagering contract, and, therefore, void, nonsuited her; and from that judgment we have this appeal.

The judgment of the court below is based on *Gilbert v. Moose*, 104 Penn. St. 74; *Meily v. Hershberger*, 16 Wkly. Notes Cas. 186; *Downey v. Hoffer*, 110 Penn. St. 109; 20 Atl. Rep. 655, and that line of cases which holds that the absolute assignment of a policy to one having no interest in the life of the insured, the assignor parting with all control over the policy, renders it a

wagering contract as to such assignee, and he cannot recover thereon. It seems to us the learned judge's conclusion is not drawn from all the material facts, but only from a part of them. At the trial, counsel on both sides admitted the following facts, which were put upon the record: "Alanson B. Tyrell, after he had made the assignment of the policy in question to the plaintiff, placed the policy and the assignment and the receipt in an envelope, and sealed it, and inclosed it in a package, and delivered it to the plaintiff, and it has remained in her possession ever since; and further, that, at the time the papers in question were delivered to the plaintiff, she was not a creditor of the insured, nor a relative, nor connected by ties of blood or marriage, but only a friend of the insured." The facts, as contained in this admission, were assumed to be all of the material facts bearing on the issue. From them it was inferred the plaintiff had no insurable interest in the life of Tyrell; and as he had, by the assignment and delivery of the policy, relinquished control over it, it was, under the authority of the line of cases already noticed, held to be a wagering contract. But do all the facts of which there was evidence, when taken together, warrant the conclusion that this plaintiff had no insurable interest in the life of Tyrell? If Tyrell, when she was young, had taken this girl into his family, treated her as a member of it, reared and educated her; when she was of age, had assisted her in getting remunerative employment, had watched over her, and interested himself in her welfare, it could have been truthfully said he stood in the place of a parent to her, not by virtue of the legal relation of a child born to him in wedlock, or by adoption under our statute, but by his voluntary assumption of the paternal relation towards her, with her consent. Without any legal obligation other than friend, he chose to assume all the burdens incident to this domestic relation of parent and child. His conduct and promises for years warranted her in believing the relation would continue while his life lasted. Having thus raised her from the humbler station in which he found her, he was continuing his kindness at the date the policy was assigned; for this offer, although rejected by the court as immaterial, must be taken as the facts: Plaintiff, among other facts, offers to prove: "That, during the first two years of her acquaintance with the insured,

she was a servant girl in his house, he being a married man with a family, and about sixty years of age; that, about the time she quit his service, he told her that she ought to educate herself, so that she might be fit to earn a living by keeping books and typewriting; that he then told her if she would go to a business college at Wilkes Barre he would pay her tuition; that she went to a business college, and was there for several months, and studied bookkeeping; that the insured paid her tuition there; that when she left the business college the insured purchased for her a desk and chair, and secured her desk room in the office of Mr. Gunster of Wilkes Barre; that when in Mr. Gunster's office she kept the insured's time book (the insured being a builder of coal breakers, and employing a large number of men); that for keeping said books the insured paid her at the rate of twenty dollars per month; that she left the office of Mr. Gunster in February, 1893, and came to Williamsport for the purpose of entering Pott's Commercial College to learn shorthand writing and typewriting; that the insured told her before she left Wilkes Barre that he would pay her tuition at said college; that she entered said college and studied shorthand writing and typewriting, and the insured paid her tuition; that after she came to Williamsport she received several letters from S. W. Tyrell, the son of the insured, informing her of his father's sickness, and that she also received two letters in the meantime from the insured, stating the fact of his sickness, and inquiring how she was getting along; that, in response to said letters, she went to the home of her father and mother, in the borough of Edwardsville, near the home of the insured, and while there the insured died."

As this case stood upon the record, the plaintiff, as the assignee of the deceased, stood in his place; was his representative. So far as appears, she was making no claim adverse to the right of deceased, or any representative of his right. The antagonist was the obligor in the policy. Therefore, she was not incompetent under clause e, section 5, act 1877. Her competency as a witness against some other representative of the deceased assignor could not be properly raised in this issue between these parties. Therefore, the offer was material, the witness was competent and the facts offered to be proven must be taken as proven. The court below,

in the opinion refusing to take off the nonsuit, treats these facts as proven, but considers them wholly immaterial. We think, having in view these facts, as well as those admitted of record, the plaintiff had an insurable interest in the life of the deceased. It does not matter that this interest was one without legal obligation on part of the insured. It was a relation in every other respect parental. Pecuniarily and otherwise he assumed a parent's part towards her, and she was justified in expecting the continuance of it. The question in *Gilbert v. Moose*, supra, was as stated by the court in these words: "Can one having no interest in the life of the insured, and for the purpose of speculation only, acquire, by assignment or otherwise, such title to the policy as the law will enforce?" In *Downey v. Hoffer*, supra, this court assumes with the court below, that the purchase by Downey was purely for a speculative purpose, and says: "The mischief resulting from a sale of the policy for purposes of speculating on human life is so contrary to the policy of the law, and so in conflict with the just principles of life insurance that it is unsafe to relax the rule that the holder of the policy must have some pecuniary interest in the life of the insured." And so will all the other cases cited by appellee where no recovery by the assignee of a policy was permitted. In each, the holder of the policy was interested in the death rather than in the life of the insured, and the policy was speculative. In the case before us the plaintiff's interest was wholly in the life of the insured. From the facts, the benefit to her from his fatherly care and pecuniary aid would, in a very few years, have far more than equaled the \$2,000 policy assigned to her. From the severance of this relation by death she perhaps sustains a greater pecuniary loss than any of his children. There may be an insurable interest not accompanied by kinship. Such interest implies a pecuniary interest, present or prospective. *Cooke Life Ins.* § 59. A moral obligation is sufficient to support it. *Ferguson v. Insurance Co.*, 32 Hun, 306. A creditor has an insurable interest in the life of his debtor, who has been discharged in bankruptcy. Says May on Insurance (§ 107): "The relationship seems to be of but little importance, except as tending to give rise to the circumstances which justify the expectation. Indeed, the doctrine of the latest of the Massachusetts cases before cited is broad enough to cover a case where

there is no relationship at all, save one, perhaps, of mere friendship, if the circumstances are such as to show that the loss of the insured life will probably result in pecuniary disadvantage to the person procuring the insurance." Here the plaintiff had nothing whatever to do with the procurement of the policy or its assignment; paid no part of the premium, and, so far as appears, never expected to pay any, for she was ignorant of its existence during the lifetime of the insured. She had substantial grounds for expecting decided pecuniary advantages from his life. Why, then, should the contract be termed speculative? Her expectancy, except in the one feature — the absence of legal obligation to enforce it — was as well founded as that of a wife or creditor. If a voluntary copartnership gives to each partner an insurable interest in the lives of the others; if the relation of superintendent or manager of a business concern gives to his employers an insurable interest in the life of the superintendent or manager, as is well settled — then the voluntary relation here gave to this plaintiff an insurable interest in the life of one who, in all pecuniary respects, occupied towards her the place of a parent, and the court below ought not to have held otherwise. The judgment is reversed, and a procedendo is awarded.*

LIFE INSURANCE — RECENT DECISIONS.

1. Application — effect of false statements when truth of same warranted — instances. — When the statements in the application are made part of the policy, and declared to be warranties, it is a good defense to show that they were untrue, without further showing that the applicant knew or believed them to be untrue. *Moulor v. Insurance Co.*, 4 Sup. Ct. Rep. 466; 111 U. S. 335, distinguished. *Provident Sav. Life Assurance Soc. v. Llewellyn*, 7 C. C. A. 579; 58 Fed. Rep. 940.

An applicant for insurance stipulated that his answers and statements should be taken as warranties, and the certificate of insurance contained a clause that it should be null and void if any of the statements in the application were false. The applicant falsely stated in his application that he had never had piles. Held, that there could be no recovery on the certificate, although his death did not result from the piles, and although he was ignorant that he had them. *Baumgart v. Modern Woodmen of America*, 85 Wis. 546; 55 N. W. Rep. 713. To same effect: *Hann v. National Union*, 97 Mich. 513; 56 N. W. Rep. 834.

An application for life insurance, which was agreed to be a part of the contract, warranted the answers of the assured to questions asked therein to be

* Reported in 28 Atl. Rep. 943.

"full, true and complete," and the policy was conditioned to be void if they were not so. One of the questions demanded the name and address of each physician who had attended the assured within a given period, and the answer gave the name and address of a single physician. As a matter of fact three physicians had attended the assured within the period named. Held, that the answer was untrue and, being a breach of the warranty, vitiated the policy and destroyed the right to recover thereunder. *Brady v. United Life Ins. Assn.*, (Ct. of App.) 60 Fed. Rep. 727.

2. Application — effect where insured gives correct information and agent of company writes untrue answers.— When an applicant for life insurance, in answer to a question, states the facts fully and truthfully, and the agent of the company, authorized to ask the question and write the answer, putting his own construction on such facts, deduces therefrom an erroneous answer, which he writes down, assuring the applicant that it is the proper answer upon the facts stated, and the one the insurer wants, the insured is not precluded by his warranty in the application from showing the facts and circumstances under which the answer was made, and when so shown the insurer is estopped from questioning the truth of the answer. 54 Fed. Rep. 580, affirmed. *Mutual Benefit Life Ins. Co. v. Robinson*, 7 C. C. A. 444; 58 Fed. Rep. 723. To same effect: *Wright's Admr. v. Northwestern Mut. Life Ins. Co.*, 91 Ky. 208; 15 S. W. Rep. 242.

3. Application — powers of agent in respect to, not affected by limitations in policy.— A provision in a life insurance policy withholding from the agents authority "to make, alter or discharge this or any other contract in relation to the matter of this insurance," does not limit the powers of the insurer's agents in preparing and accepting an application for insurance. *Mutual Benefit Life Ins. Co. v. Robison*, 7 C. C. A. 444; 58 Fed. Rep. 723.

4. Breach of warranty only available by special plea.— In an action upon a policy of life insurance, although the application is made part of the policy, and the truth of the answers therein made is expressly warranted, breach of such warranty is matter for special plea, and evidence of such breach is not admissible under the general issue, applying the rule frequently recognized by this court that, "in relation to the contract of insurance, all matters which go to show the transaction to be void or voidable, on the ground of fraud or otherwise, must be specially pleaded." *Benjamin v. Connecticut Indemnity Assn.*, 44 La. Ann. 1017; 11 South. Rep. 628.

5. Assignment of endowment policy.— An endowment policy insuring a husband's life for fifteen years provided for the payment of the amount of the insurance to his wife "for her sole use, if living, or, if the person whose life is insured shall survive said term of fifteen years, the sum above insured shall then be paid to him." Held, that the interest of the wife ceased on the survival of the husband for fifteen years; and an assignment of the policy by husband and wife during the fifteen years, though invalid as to the wife when made, was made valid by the survival of the husband for that period. *Miller v. Campbell*, 140 N. Y. 457; 35 N. E. Rep. 651.

6. Change of beneficiary.— The charter of an insurance company, and a general statute, each provide that a policy of life insurance issued for the benefit of the wife and children of the insured shall inure to their benefit, and

that all such insurance shall be paid to the beneficiaries named in the policy, free from the demands of creditors of the insured. Held, that neither the charter nor the statute contained anything in conflict with the right of the insured, reserved in the policy, to change the beneficiary. *Hopkins v. Hopkins' Admr.*, 92 Ky. 324; 17 S. W. Rep. 864.

A life policy provided that the money to become due on it should be payable to C. or legal representative, or such person as assured might appoint by writing on notice to the insurer; and that the policy should not be assigned unless notice and copy of assignment be given assured. Held, that, the policy having been assigned by writing signed by assured and the beneficiary, in consideration of an agreement to pay a certain amount to the assured if he should outlive his expectancy, otherwise to the beneficiary, and notice and copy of the assignment having been received by the insurer without objection, there was a valid assignment and substitution, so that the original beneficiary had no interest in the policy which would entitle her to sue thereon. *Bowen v. National Life Assn.*, 63 Conn. 460; 27 Atl. Rep. 1059.

7. Contract of insurance — by what law governed.— A policy of life insurance which is delivered and the first premium on which is paid in the state in which the assured resides is governed by the laws of that state. *Equitable Life Assur. Soc. v. Winning*, 7 C. C. A. 359; 58 Fed. Rep. 541.

8. Forfeiture for non-payment of premium — extension, waiver, etc.— Where a life insurance company receives from the assured payment of an installment of premium while a subsequent installment is overdue, it waives the right to claim a forfeiture on the ground that such subsequent installment was not paid on the day it became due, in accordance with a condition in the policy that it should become void if any installment should not be paid on the day when payable. 19 N. Y. Supp. 8, affirmed. *De Frece v. National Life Ins. Co.*, 136 N. Y. 144; 32 N. E. Rep. 556.

A life insurance policy contained a provision that "if a note, taken for the premium or renewal premium, or any part thereof, on this policy, shall not be fully paid when due, the premium shall be considered as fully earned, and the policy no longer be in force or binding upon the company." G. gave his note for the premium, which he failed to pay when it became due. Held, that the company was released thereby. *Imperial Life Ins. Co. v. Glass*, 96 Ala. 568; 11 South. Rep. 671. A provision in a life insurance policy authorizing the deduction, from the amount payable in case of the death of the insured, of any balance of the premium for the year remaining unpaid, or any indebtedness on the policy, is not inconsistent with a provision that the policy shall no longer be in force or binding upon the company if a note for a premium, or any part thereof, is not fully paid when due. *Ibid.*

Where a life insurance policy provides that no agent "can alter, modify or waive any of the terms or conditions of this policy," and "that if any subsequent premium thereon be not paid when due, and a separate receipt, signed by the president or secretary of this company in each case, given therefor, then this policy shall cease," the general agents of the company, without its consent, cannot extend the time for paying premiums. *Conway v. Phoenix Mut. Life Ins. Co.*, 140 N. Y. 79; 35 N. E. Rep. 420. Where such agents, under a custom in their office, of which the company has knowledge, are at liberty,

not to make any new agreement as to time for payment of premiums, but to accept payment after they are due, and thus waive the right to declare a forfeiture, provided that at the time the conditions have not been changed by an alteration in the health of the insured, and they extend the time of payment of a premium by the insured, the risk is on him, that, pending the delay granted by the agents, he may change in health or die, and his insurance be lost; and, in case of his death before payment, the policy is forfeited. O'Brien and Maynard, JJ., dissenting. *Ibid.*

A policy provided for payment of premiums weekly, the policy to be void if the premiums should be in arrears more than four weeks; agents not authorized to make or alter contracts, or waive forfeiture, or receive premiums in arrears after the time allowed. A receipt book, issued with the policy, declared policies in arrears more than four weeks lapsed; expressly prohibited agents from receiving, and members from paying, on lapsed policies; and prescribed a method of revival. Held, that mere assurances of a branch superintendent of the company that an arrearage did not matter, made no difference, etc., would not excuse a delay of fifteen weeks, without any steps taken for revival under the rules. *Mallory v. Metropolitan Life Ins. Co.*, 97 Mich. 416; 56 N. W. Rep. 773.

The oral agreement of the secretary of a life insurance company, made outside the state in which its general offices are located, to waive payment of a premium at maturity, is binding on the company. 17 N. Y. Supp. 333, reversed. *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473; 34 N. E. Rep. 289.

When a note is given and accepted in payment of the first year's dues and there is no provision, either in the policy or the note, making the payment of the note a condition to the continuance of the insurance after the note matures, such policy is not forfeited on failure of the assured to pay the note at maturity on demand. *Stepp v. National Life & Maturity Assn.*, 37 S. C. 417; 16 S. E. Rep. 134.

A dividend being applicable towards the payment of a note at the same time that the interest on the note fell due, the default of the assured to pay the interest does not discharge the defendant from the duty to apply the dividend, if such application would pay off the note, and so prevent a forfeiture of the policy. *Van Norman v. Northwestern Mut. Life Ins. Co.*, 51 Minn. 57; 52 N. W. Rep. 988. The default of the assured in the payment of interest, amounting to four cents, is too trifling to be noticed. *Ibid.*

9. Default in payment of premium — right to new policy for a proportion of sum insured.—An insurance policy provided that, in case of default in the payment of premiums, the company should not be liable for the sum insured or any part thereof, and the policy should cease and determine, provided that, if default should be made after the receipt of two whole-year premiums, then the company should issue a new policy for a proportion of the sum insured, on the surrender of the old policy within twelve months after default. Two whole-year premiums were paid, but the policy was not surrendered within twelve months after default. Held, that the company was not liable for any part of the sum insured. *Distinguishing Montgomery v. Insurance Co.*, 14 Bush, 51. *Hexter v. United States Life Ins. Co.*, 91 Ky. 356; 15 S. W. Rep. 863. To same effect: *Northwestern Mut. Life Ins. Co. v. Barbour*, 92 Ky. 427; 17 S. W. Rep. 796.

10. Note accepted by agent in payment of premium without authority—want of consideration.—A note in payment of the premium was given to the agents of a life insurance company with an application for a policy, so as to obtain insurance at once, instead of waiting for the action of the company on the application. The contract signed and delivered to defendant by the agent purported to give the insurance, subject to conditions on the back, one of which was that the contract was not valid unless the premium was "actually paid in cash." The agents had no authority to alter the contract in this respect, and the company did not waive this condition. Held, that there was no consideration for the note. *Dunham v. Morse*, 158 Mass. 132; 32 N. E. Rep. 1116. The action of the agents in charging themselves with the amount of premium, and giving the insurance company credit on their books, was not binding on the company, though they were authorized to keep money received for the company in their private bank account, as such authority was not an agreement that a credit on the agent's books would constitute a payment in cash to the company where no money was received. *Ibid.*

11. Interest—by what law governed.—Interest on the amount due on an insurance policy should be computed at the legal rate that obtains at the place of payment provided for in the policy, and not at the place where suit is brought thereon. *Stepp v. National Life & Maturity Assn.*, 37 S. C. 417; 16 S. E. Rep. 134.

12. Insurable interest—wager policy.—In an action on a life insurance policy, it appeared that the insured took out the policy in her own name, and afterwards she delivered it to her daughter, with instructions to pay the premiums, pay the insured's funeral expenses and that the balance should go to the daughter's child. The daughter paid the premiums as directed. Held, that the policy was not a wagering policy, and was valid. *Burke v. Prudential Ins. Co.*, 155 Penn. St. 295; 26 Atl. Rep. 445.

It is no defense to an action on a policy of life insurance, brought by the administrator of the deceased, that the policy was issued and delivered to, and all the premiums paid by, a beneficiary who had no insurable interest in the life of the deceased. *Brennan v. Prudential Ins. Co.*, 148 Penn. St. 199; 23 Atl. Rep. 901.

13. Notice and proofs of loss—sufficiency of—waiver.—Under the requirement of a life policy that proof of the death of assured satisfactory to the insurer be given, a sufficient proof cannot be impaired by a false statement therein as to the person entitled to the insurance. *Bowen v. National Life Assn.*, 63 Conn. 460; 27 Atl. Rep. 1059.

Where a life insurance company refuses to furnish the usual blanks to prove a death loss, and notifies the party in interest that the death claim will be contested, it thereby waives the right to formal proof of death. *Dial v. Association*, 29 S. C. 560; 8 S. E. Rep. 27, followed. *Stepp v. National Life & Maturity Assn.*, 37 S. C. 417; 16 S. E. Rep. 134.

Proof that, prior to a failure to pay a premium on a life insurance policy, the insurance company had declared its intention to forfeit the policy if such premium was not paid, and that, soon after the default in payment, the company declared the policy forfeited, and entered it as a lapsed policy in the

company's books, is competent to establish a waiver of the provisions of the policy requiring notice and proof of loss. *Equitable Life Assur. Soc. v. Winning*, 7 C. C. A. 359; 58 Fed. Rep. 541.

14. Exemptions from liability — suicide.— A clause in a life insurance policy avoiding it if death results from suicide (sane or insane), includes self-destruction irrespective of the assured's mental condition at the time of the act, and the court, in an action on the policy, will not attempt to measure the degrees of insanity. *Tyler and Thompson, JJs., dissenting. Billings v. Accident Ins. Co.*, 64 Vt. 78; 24 Atl. Rep. 656.

Where a life policy did not cover suicide, but provided that in case of "death by his (insured's) own hand or act, whether sane or insane," the company should be liable only for the premiums paid, and plaintiff's evidence, in an action on the policy, showed that death was caused by insanity, and defendant offered no evidence, plaintiff is entitled to a directed verdict for the full amount of the policy. *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221; 24 Atl. Rep. 992. In such case the fact that the evidence shows that the cause of the insured's death was insanity does not tend to prove that he committed suicide, insanity being a disease liable to cause natural death, and the presumption being, where insured was found dead, that his death was natural or accidental. *Ibid.*

An exemption of: "Suicide. The self-destruction of the assured, in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the assured"—does not prevent liability for an intentional self-killing when the reasoning faculties are so far impaired by insanity as to be incapable of understanding the moral character of the act, even though appreciating its physical nature and consequences. *Connecticut Mut. Life Ins. Co. v. Akens*, 150 U. S. 468; 14 Sup. Ct. Rep. 155. The word "disease," being unrestricted by anything in the context, includes disease of mind as well as of body. *Ibid.*

15. Reinstatement—construction of policy.— A reinstatement by a mutual life insurance company of a member whose policy had lapsed, on his payment of the back dues, on condition that he "is now, and has been during the past 12 months, in continuous good health, and free from all disease, infirmity or weakness," is not vitiated by slight illness within such twelve months, of a temporary nature, which indicates no vice in his constitution, and from which he had fully recovered at the time of his reinstatement, but the illness must have been such that he would not have been received if he had been an original applicant for insurance. *MacRae, J., dissenting. French v. Mutual Reserve Fund Life Assn.*, 111 N. C. 391; 16 S. E. Rep. 427.

16. Conflicting claims to proceeds of policy — rights of creditors and others.— A man obtained a policy of insurance on his life, payable "to his wife M., or to (his) heirs at law." At the time he was cohabiting with M., and had married her, but the marriage was void, because he had a former wife living and undivorced. Held, that M. was entitled to the insurance money. *Overbeck v. Overbeck*, 155 Penn. St. 5; 25 Atl. Rep. 646.

Where a policy of life insurance provides that the money shall be paid to the insured himself if he live to a certain date, and if he die before that time

to a certain person, trustee for the insured's mother, it is competent to show by parol that the insured stated in his lifetime that his design in creating the trust was to provide for his mother's support after his death, and where the mother dies before the insured, there is a resulting trust in his favor, and the proceeds of the policy are a part of his estate. *Bancroft v. Russell*, 157 Mass. 47; 31 N. E. Rep. 710.

Where a person advances money to pay the premiums on another's life insurance policy under an agreement that he shall hold the policy as a security for their repayment, and the name of the wife of such person is inserted as one of the payees upon the assurance of the husband that this is merely for the purpose of making his security more effectual, the wife has no beneficial interest in the policy except as trustee for the amount advanced by the husband. *Johnson v. Knights of Honor*, 53 Ark. 255; 13 S. W. Rep. 794, distinguished. *McDonald v. Humphries*, 56 Ark. 63; 19 S. W. Rep. 284.

While ordinarily a policy of life insurance payable to the wife upon the death of her husband is not subject to be applied in payment of his debts, yet where the policy is in the form of an endowment, a certain sum to be repaid after a specified number of years, the transaction is in the nature of a loan, the insurance being a mere incident; and, where the premiums have been paid by an insolvent debtor, the insurance money on such policy received by the wife during the lifetime of the husband is not transmuted so as to be hers as against creditors of the husband, but is subject to their claims. *Talcott v. Field*, 34 Neb. 611; 52 N. W. Rep. 400.

Under Alabama Code, section 2356, which provides that a husband or father may insure his life for the benefit of his wife and children, or minor children, and such insurance is exempt from liability for his debts or engagements, if the annual premiums do not exceed \$500, the proceeds of a policy in favor of the wife, upon which the annual premiums did not exceed the sum specified, belong to the wife absolutely. *Craft v. Stoutz*, 95 Ala. 245; 10 South. Rep. 647. It is held that the same statute does not authorize the assignment by a father of an insurance in his own name to his minor children, he being in debt at the time. *Friedman v. Fennell*, 94 Ala. 570; 10 South. Rep. 649.

Decedent misappropriated money of a partnership of which he was a member, and applied a portion thereof to the payment of premiums on life insurance procured by him for his wife's benefit. The amount misappropriated exceeded the amount of the policies. Held, that the surviving partner could recover such proceeds, the wife's insurable interest in the life of decedent not being property in the sense that it was mingled with the money converted, so that only the amount of premiums could be recovered. 18 N. Y. Supp. 56, affirmed. 19 N. Y. Supp. 151, reversed. *Holmes v. Gilman*, 138 N. Y. 369; 34 N. E. Rep. 205.

17. Surrender of policy by creditor after death of insured, but in ignorance thereof—action to reinstate.—A creditor carrying a \$6,000 policy of insurance upon the life of a debtor, in order to be relieved of the burden of further premiums, surrendered the same for a paid-up policy for \$2,500, under the rules of the company, subsequent to the death of the insured,

both parties being ignorant of such death. Held, that as the surrender was not by way of compromise, but under a mutual mistake of fact, supposed to be undoubted, equity would grant relief by reinstating the policy holder to her rights under the surrendered policy. Paxson, Ch. J., and Mitchell, J., dissenting. 140 Penn. St. 201; 21 Atl. Rep. 392, affirmed. Riegel v. American Life Ins. Co., 153 Penn. St. 134; 25 Atl. Rep. 1070.

18. Surrender of policy by creditor to insurer — effect upon right of action of representatives of insured.—An insurance policy had been pledged as collateral security for a loan. After the death of the assured his executors tendered to the creditor the amount of the loan, with interest, and demanded the policy. He refused to deliver it up, and the insurer, with full knowledge of these facts, procured a surrender of the policy from the creditor to itself. Held, that the tender extinguished the creditor's title to the policy, and, as the insurer acquired by the surrender no greater rights than he had, it is liable to an action at law on the policy by the representatives of the assured. Hicks v. National Life Ins. Co., (Ct. of App.) 60 Fed. Rep. 690.

HAYNES v. RALEIGH GAS Co.

(Supreme Court of North Carolina, April 10, 1894.)

1. ELECTRIC LIGHT COMPANY. INJURY TO TRAVELER BY ELECTRICITY. NEGLIGENCE. PRIMA FACIE CASE. Evidence that defendant electric light company had its line constructed along a street; that a guy wire from one of its poles stretched across the sidewalk, and, charged with electricity from another guy wire crossing the feed wire of a street railway company, had become detached from a tree to which it had been fastened, and was hanging to the ground; and that plaintiff's son was killed by coming in contact with it while walking along the sidewalk, makes a prima facie case, and puts on defendant the burden of showing that it was not negligent.

2. CONTRIBUTORY NEGLIGENCE IN GRASPING WIRE HANGING NEAR SIDEWALK. It is not contributory negligence for an intelligent boy, ten years old, while walking along a sidewalk, to grasp a guy wire from an electric light pole which was hanging to the ground, there being nothing to indicate that it was charged with electricity.

3. GENERAL DUTY OF ELECTRIC COMPANIES IN THE CARE OF WIRES AND POLES IN STREETS. Electric light companies having their lines along a street are charged with the highest degree of care in the construction, inspection and repair of their wires and poles, that travelers along the street may not be injured thereby.

ACTION by Z. W. Haynes, administrator of John W. Haynes, deceased, against the Raleigh Gas Company for the death of deceased. Judgment for defendant. Plaintiff appeals.

Battle & Mordecai, W. N. Jones and Strong & Son, for appellant. *Busbee & Busbee, Armistead Jones and R. O. Burton*, for appellee.

BURWELL, J. John W. Haynes, the intestate of the plaintiff, was about ten years of age. He was "a very healthy, intelligent, moral and industrious boy, well educated for his age." On the morning of November 15, 1892, he assisted his older brother, who was a carrier for a newspaper, and when returning home, about seven o'clock, he took hold of a wire on or near the sidewalk over which he was passing, and was killed by an electric current. The place where this occurred was on North street, not far from its intersection of Blount street, in the city of Raleigh. The cause of his death is admitted, and also the fact that the deadly current came from the "feed wire" of the street railway company, whose line was constructed along Blount street, as were also the electric light wires of the defendant. One of the defendant's poles stood on Blount street and was supported by three guy wires — one attached to a tree on Blount street, and the other two to trees on North street. The first of these guy wires (the one that was attached to the tree on Blount street) crossed and was in contact with the feed wire of the railway company. The longer one of the other two had become detached from the tree on North street, and was hanging to the ground. The current passed along these two guy wires, and killed the boy as soon as he grasped the one that had fallen on or near the sidewalk. These facts were testified to by the plaintiff's witnesses, and seem not to have been controverted.

Among the special instructions asked by plaintiff was the following: "Upon the evidence of the plaintiff, if believed, there is a presumption of negligence upon the part of the defendant, and in that case the burden is upon the defendant to show that there was no negligence on its part." His honor refused so to instruct the jury, and the plaintiff excepted. Pretermitted for the present the consideration of the question whether the boy was guilty of contributory negligence in taking hold of the wire, we are brought by this exception to the inquiry, does the expression "res ipsa loquitur" apply to the state of facts set out above, and do those facts make out a prima facie case of negligence against

the defendant, and cast upon it the burden of showing that it was not negligent? Argument and authority are not needed to show that those who use the streets of a city, by permission of those who have power to grant such privilege, for purposes of private gain, owe to persons upon such streets the duty of so conducting their business as not to injure them. To speak particularly of the matter now under consideration, the defendant company, using the streets of the city of Raleigh for its purposes, as it was allowed to do, owed to the deceased the duty of keeping out of his way, as he went about his business and to his home, all its wires, and especially the duty of preventing his exposure to contact with any wire placed in the streets by it that carried a current of electricity. It was the duty of the defendant to keep the highway along which it put its poles and wires substantially in the same condition as to convenience and safety as they were in before it constructed its lines along the streets. Negligence has been said to be a failure of duty. Proof that there was a "live" wire (carrying a deadly current) down in the highway surely raised a presumption that some one had failed in his duty to the public. When to this was added proof that this death-carrying wire was put above the street by the defendant, and was its property, and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete *prima facie* case of negligence was made out, and the burden was cast upon the defendant to show that this live wire was in the street through no fault of its servants and agents. In *Aycock v. Railroad*, 89 N. C. 329, where a plaintiff sought to recover damages for the burning of his property, fire having been communicated to it by sparks from an engine on the defendant's road, Chief Justice Smith, discussing "the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks," declares that this court will "abide by the rule so long understood and acted on in this state, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpatory circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence," and he adds that "the servants of the company must know and be able to

explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and if you are not in default show it, and escape responsibility.' " This is affirmed in *Moore v. Parker*, 91 N. C. 275, where it is said that a *prima facie* case of negligence being thus made out against the defendant, he must produce proof of care on his part, or of some extraordinary accident that rendered care useless, in order to rebut the presumption. Guided by the principle announced in these cases, we come to the conclusion that this plaintiff should have been allowed to say to this defendant: "The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default show it and escape responsibility." Numerous authorities might be cited to sustain our conclusion upon this point, the cases being strictly analogous to this one. But we content ourselves with a reference to *Ray on Negligence of Imposed Duties*, 145; *Wood Ry. Law*, 1079; *Whit. Smith Neg.* 423. The last-mentioned author says (p. 422): "If the accident is connected with the defendant the question whether the phrase '*res ipsa loquitur*' applies or not becomes a simple question of common sense." It seems to us that there is nothing in the relation of the deceased to the defendant, or in any of the circumstances attending the incident of his death, to prevent the rigid application here of the rule announced by Judge Gaston in *Ellis v. Railroad*, 2 Ired. 138, and reaffirmed as stated above in *Aycock v. Railroad*, *supra*.

Thus far in the consideration of this matter we have left out of view the contention of the defendant that the plaintiff's own evidence disclosed the fact that his intestate was guilty of contributory negligence, or at any rate that the facts so established, taken in connection with other facts which defendant's witnesses testified to, if found by the jury, convicted him of contributory negligence; and we have also kept out of view the contention of the plaintiff that there was no evidence of contributory negligence on the part of the deceased. His honor was asked so to tell the jury, and he refused so to instruct them. In this state, by statute, the burden of showing contributory negligence in this action is thrown on the defendant. What is negligence is a question of law to be declared by the court. *Emry v. Railroad Co.*, 109 N.

C. 589; 14 S. E. Rep. 352, and cases cited. It was incumbent on the defendant, therefore, to show facts, either admitted or proved by the plaintiff, or testified to by his own witnesses, and found by the jury, from which the court would draw the legal inference that the deceased was negligent, and direct the jury to render a verdict declaratory of this legal inference, they having first determined that all the disputed facts pertaining to this part of the controversy were established by a preponderance of the testimony.

After a careful examination of all the evidence adduced on the trial, and after a full consideration of the argument of the able counsel for the defendant, we are clearly of the opinion that there was no evidence of contributory negligence, and his honor should so have told the jury. A child is held to such care and prudence as is usual among children of his age and capacity. *Murray v. Railroad*, 93 N. C. 92. The defendant contends that the deceased was ten years of age, "a very healthy, intelligent, moral and industrious boy." Let us assume this to be true. As he returned to his home the morning of his death, passing along the streets of the city, he was trespassing on no one's property. He was walking where he had a right to walk, not by mere permission or invitation, but because he, as one of the public, had an absolute right so to do. The wire was on the sidewalk. Only one witness saw him when "he took hold of the wire, and the wire threw him in the ditch." That witness testified that "he did not have to reach for it. He just reached out his hand and took it. He did not have to stoop." No witness testified that there was anything from which even an adult could have inferred that this wire was carrying a deadly current of electricity, or, indeed, any current at all. True, the witness who saw him grasp the wire, when he came to his rescue, saw the fiery indications of the passing of the current from the wire to his hand, and several witnesses deposed that, after the accident and the throwing of the wire into a yard where there was wet grass, they noted that the wire was "steaming" at the point where one of its coils touched the sidewalk, and also at its extremity in the yard. Grant this to be true, and yet there is not, as it seems to us, any evidence that it was steaming when the deceased caught the wire, or, if it was, that its steaming was such as to carry, to a boy passing along, a warning that he must not touch it. We

should be very loth to declare an adult guilty of negligence for grasping a wire such as this one under circumstances such as the defendant contends surrounded the deceased. We certainly cannot declare that this boy, whose conduct must be judged with due regard for his boyish nature and habits, negligently caused his own death. The instruction that "upon the evidence the plaintiff's intestate was not guilty of contributory negligence" should have been given.

It follows from what has been said that, as the case was presented at the trial, his honor should have told the jury to answer the second issue, "No," and should have told them to answer the first issue, "Yes," if they believed the plaintiff's evidence, unless the *prima facie* case of negligence made out against the defendant was rebutted. It is said in *Moore v. Parker*, *supra*, that proof of care on the part of the defendant, or of some extraordinary accident which renders care useless, is required to rebut the presumption. Inasmuch as there must be a new trial for the error above stated, it may be well to declare what degree of care is required of the defendant. It is due to the citizen that electric companies that are permitted to use, for their own purposes, the streets of a city or town, shall be required to exercise the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it. Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. "As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents." Ray Neg. Imp. Dut. 53. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill

can easily place wires and poles so that they will not break and fall, unless subjected to some strain that could not be anticipated, and it can as readily prevent the possibility, under ordinary circumstances, of the contact of wires that should not be allowed to touch one another. There was error in allowing the defendant to prove that there was published in one of the city newspapers "a general statement" to the effect that its current was not a deadly one, was not fatal to human life. That fact could not excuse the defendant. If it acted upon such a statement, and, without further inquiry or examination, conducted itself in the insulation of the wires as if the statement was true, that was to be negligent, for, in such an affair, to be mistaken and in error is to be careless. The fact that such a publication was made was irrelevant to the issues in the cause. What has been said seems sufficient to guide the next trial of the case. New trial.*

1. Injury to travelers from electric wires in street — negligence.— See former cases in the series as follows: *Kraatz v. Brush Electric Light Co.*, 3 Am. R. R. & Corp. Rep. 345; *United Electric R. Co. v. Shelton*, 3 Am. R. R. & Corp. Rep. 577; *Clements v. Louisiana Electric Light Co.*, 6 Am. R. R. & Corp. Rep. 511, and note.

2. Liability of city for injury to traveler on street by electricity from hanging wire.—In an action against a city for personal injuries caused by a defect in a street, there was evidence that plaintiff was hurt by a discharge of electricity from a loose wire which he took hold of to remove from the street; that the wire was an acoustic one, and was used without electricity, but that it touched an electric wire which had lost its insulation at the point of contact; that the acoustic wire had been hanging loose for three weeks in such a position that the wind might bring it against the electric wire, and that the want of insulation could be seen from the street. Held, that there was evidence from which the jury could find that the likelihood of the defect coming into existence should have been obvious to defendant's inspectors of wire during the three weeks, and, therefore, that the city ought to have known of the defect within a time after it came into existence so short that it might fairly be presumed to have elapsed when the accident happened. *Bourget v. City of Cambridge*, 159 Mass. 388; 34 N. E. Rep. 455. A request to charge that, if the negligence of the respective owners of the electric and the acoustic wires contributed to the accident, without which plaintiff would not have been injured, he could not recover, was properly refused, since the only way in which the owners could have contributed to the accident was by helping to create the defect, and the liability of the town was for not abating it. *Ibid.* In *Graham v. City of Boston*, 156 Mass. 75; 30 N. E. Rep. 170, the city was held liable in a similar case.

* Reported in 19 S. E. Rep. 344.

CITY OF CHICAGO V. BLAIR ET AL.

(Supreme Court of Illinois, October 31, 1893.)

1. MUNICIPAL CORPORATION. WHAT ARE LOCAL IMPROVEMENTS. STREET SPRINKLING. Street sprinkling is not a "local improvement" within the meaning of a statute authorizing cities and villages "to make local improvements by special assessment, or special taxation, or both, of contiguous property, or general taxation or otherwise as they shall by ordinance prescribe."

2. The decision of the city council that a proposed act constitutes a "local improvement" within the meaning of the statute is not conclusive.

THIS was a proceeding to confirm a special assessment upon the property of appellee and others for local improvement of the street upon which the property was situated. The objectors appeared in the County Court and filed objections, which, among the questions raised, deny the power of the city to make the assessment for the purposes designated in the ordinance. The ordinance provided that the roadway of certain named streets, between specified points thereon, should be sprinkled with water four times a day during the period commencing April 15, 1893, and ending November 15, 1893; the first sprinkling each day to be completed before nine o'clock A. M., the second between nine A. M. and twelve M., the third between twelve M. and three-thirty P. M., and the fourth between three-thirty and six P. M., there being at least an hour's time between the sprinklings of any street. The ordinance then provides for the manner of sprinkling, and that it shall be at the rate of at least one gallon for every forty square feet of roadway, the work to be done under the superintendent of public works. Section 2 of the ordinance provides that said improvement shall be paid for by special assessment upon property benefited, in accordance with article 9 of the Cities and Villages Act. Section 3 appoints commissioners to make an estimate of the cost of said improvement, including labor, materials and all other expenses attending the same, and the cost of making and levying the assessment, etc. The commissioners appointed returned an estimate as follows: "Cost of the improvement, \$12,000.80; inspection and superintending, \$360; cost of making and levying assessment, \$370; total cost, \$12,730.80," which was approved by the city council. A petition was filed in

the County Court for the appointment of commissioners to extend the assessment upon property benefited. Commissioners were appointed, who returned an assessment roll, apportioning said cost upon property by them deemed specially benefited by the proposed improvement. On motion of objectors the assessment was annulled by order of the court and the petition dismissed. The city appeals.

Adolf Kraus, Corporation Counsel, M. W. Robinson and F. W. C. Hayes, for appellant. Wilson, Moore & McIlvaine, George H. Taylor, Young, Makeel & Bradley, Montgomery & Montgomery, Runyan & Runyan, Walker, Judd & Hawley, Winston & Meagher, Wolseley & Heath, C. S. Darrow, A. W. Pulver, W. J. Hynes, Mason Bros., J. R. Geary, W. S. Hefferan, D. H. Horne, J. F. Clare, A. Hertig, Osborne Bros. & Burgett, W. A. Phelps, Bayley & Waldo, J. A. Peterson, W. T. Underwood, A. H. Tyrrell, Rich & Stone, Otis & Graves, R. B. Twiss, Pedrick, Dawson & Clarke, N. N. Cronholm, H. W. Brandt, Felsenthal, D'Ancona & Ringer, James Maher, C. M. Hardy, C. H. Mitchell, C. M. Osborne, Ripley & Alling, Tatham & Webster, E. U. Fliehman, F. B. Packard, Kirk Hawes, Cohrs & Green and C. E. & D. G. Anthony, for appellees.

SHOPE, J. (*after stating the facts*). The question presented by this record is whether the municipal authorities in cities and villages organized under the general law for the incorporation thereof have power to provide that the cost of sprinkling the streets of the city or village shall be paid by special assessment. In other words, is the sprinkling of streets a local improvement within the meaning of the statute authorizing cities and villages to make local improvements by special assessment? Section 9, article 9 of the Constitution authorizes the general assembly to vest corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise; and, in pursuance thereof, the legislature has vested such authorities "with power to make local improvements by special assessment, or special taxation, or both, of contiguous property, or general taxation or otherwise as they shall by ordinance prescribe."

It is contended that under this statute the corporate authorities alone are to determine what is and is not a local improvement, and they having determined in this case that the sprinkling of the streets designated in the ordinance was a local improvement, their decision is final and not the subject of review. The case of *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill. 656; 25 N. E. Rep. 962, is cited in support of this contention. There the city passed an ordinance for the construction of a viaduct in one of the streets of the city over the tracks of the railway, and also spanning Cahokia creek. The objection was that the building of the viaduct in the street was "not a local improvement within the meaning of the statute authorizing the levy of special assessments," and it was held that the city being empowered "to lay out, establish, open, alter, widen, extend, grade, pave and otherwise improve streets," and "to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof" (paragraphs 7-28, § 1, art. 5, chap. 24, R. S.), the city council had power to determine that the construction of the viaduct in the street was a local improvement, and to order the same to be paid for by special assessment. The language quoted by counsel was used in respect of the facts of that case, and as applied thereto was entirely accurate, but the decision cannot be regarded as authority for the contention in this case. The power of the city council to declare what shall be local improvements is necessarily implied from the power to make the same in the mode and by the means prescribed. But this implication can arise only in respect of improvements they are authorized to make by special assessment or special taxation. So long as the attempted exercise of the power relates to such public work as was within the legislative contemplation when giving the authority to the municipality, a reasonable exercise of the implied power in declaring such work a local improvement will be sustained (*City of Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451; 26 N. E. Rep. 366); and in such cases the method of construction, the materials used, and whether it shall be treated as a local improvement, to be paid for in whole or in part by special assessment or special taxation, or is to be paid for out of the general revenues of the city or village, are matters resting within the legislative discretion of the municipal authorities. *Fagan v. City of Chicago*, 84 Ill. 227; *Louis-*

ville & N. R. Co. v. City of East St. Louis, 134 Ill. 656; 25 N. E. Rep. 962. Improvements authorized to be made by this species of taxation are public improvements (Cooley Taxn. 67-416; Burroughs Taxn. 10, et seq.; Davis v. City of Litchfield, 145 Ill. 327; 33 N. E. Rep. 888); and an attempt by the municipal authority to declare a purely private work a local improvement within the meaning of the statute would be ultra vires, and the courts would be compelled to so declare. A local improvement within the meaning of the statute is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality. The only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burden imposed. Cooley Taxn. chap. 20; Dillon Mun. Corp. 596; Davis v. City of Litchfield, supra; Kuehner v. City of Freeport, 143 Ill. 92; 32 N. E. Rep. 372; Larned v. Chicago, 34 Ill. 267; Chicago v. Baer, 41 Ill. 306. If, therefore, from an inspection of the ordinance authorizing the making of the improvement it appears, from the nature of the work proposed, that the market value of abutting or adjacent property would not be increased thereby, as a matter of law it would not be a local improvement within the meaning of the statute, and no declaration of the corporate authorities could make it so. On the other hand, if the property is or may be benefited by the improvement, the extent of such benefit, and hence the amount to be assessed upon the property in proceedings for special assessment, is a question of fact, to be determined in the mode prescribed by the statute. De Koven v. City of Lake View, 131 Ill. 541; 23 N. E. Rep. 240.

It remains to consider whether the sprinkling of the streets as contemplated by the ordinance is a local improvement that may be made, and the expense thereof paid, by special assessment upon adjacent property. "It is," says Mr. Dillon, "a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third,

those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." *Mun. Corp.* (4th ed.) § 8; *Wright v. Chicago*, 20 Ill. 252; *Elston v. Chicago*, 40 Ill. 514; *Cook Co. v. McCrea*, 93 Ill. 236. The authority to municipalities to impose burdens upon persons or property is wholly statutory, and where its exercise may result in divestiture or transfer of property, the right to exercise it must be clear and strictly pursued, and this rule applies to proceedings under the taxing power, including special assessment and special taxation. *Davis v. City of Litchfield*, *supra*.

No express power is granted to make special assessment for the particular work proposed. But it is insisted that, as by clause 7, section 1, article 5 of the act, power is given "to lay out, open, alter, widen, extend, grade, pave and otherwise improve streets," etc., by the words "or otherwise improve" power is conferred upon the municipal authorities to determine what character of improvement, other than those enumerated, shall be made; and, if they determine that the streets shall be sprinkled, it is, therefore, an improvement within the meaning of article 9 of the act. This is a misapprehension. The city may, undoubtedly, in the sense in which the word "improve" is here used, repair the streets, sprinkle, sweep and cleanse them, as in their discretion the public necessity and convenience may require. But the term "local improvement," prior to the adoption of the Constitution and passage of the act in question, had, by common usage, a well-defined meaning, and it will be presumed to have been employed in the sense thus attributed to it. It was understood, as applied to a street, as signifying the improvement of the street as such, and for the purposes for which it was designed, made in a particular locality, by reason of which the real property, abutting or adjacent, was specially benefited in its market value. *Cooley Taxn.* 109, 110; *Dill. Mun. Corp.* 596, 597. This court, in numerous cases decided before the adoption of the present Constitution, as well as in many since, gave the like signification to the term. *Canal Trustees v. Chicago*, 12 Ill. 403; *Higgins v. Chicago*, 18 Ill. 276; *City of Ottawa v. Macy*, 20 Ill. 413; *Lill v. Chicago*, 29 Ill. 31; *Larned v. Chicago*, *supra*; *Chicago v.*

Baer, *supra*; *Scammon v. Chicago*, 42 Ill. 193. Further citation will be unnecessary. Used as it is, in connection with special assessments, which are necessarily based upon the idea of equivalent benefits to the property owner, the idea of permanency in the improvement is necessarily involved. That is, the benefit must flow from the actual or presumptive betterment of the street, and must be of such character as to enhance the market value of the property. *Kankakee Stone & Lime Co. v. City of Kankakee*, 128 Ill. 176; 20 N. E. Rep. 670. It cannot, we think, in any just sense be said that street sprinkling is an improvement within the contemplation of article 9 of the Cities and Villages Act. In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled. It is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material—are evanescent, and that in a few years at most they will necessarily require renewing; and that it makes no difference whether it be water put upon the street, or wood or granite; that all alike are but temporary in character. In a sense this is true, but not in a practical sense. It is common experience that well-paved streets and convenient and durable sidewalks, furnishing access to property, do in fact enhance its market value. It is, however, insisted that the sprinkling of the street during the summer months renders the occupation of the adjacent property more enjoyable and comfortable, and that, therefore, the property is enhanced in value. Doubtless, the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers; or by open-air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So, the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of persons residing upon the street. The proper watering and clipping of the grass upon lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment and, possibly, the healthfulness of the locality. These all might be improvements, and increase, while they continued, the desirability of property in their locality. But they are not improvements, either

of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment.

The tendency of municipal government to arrogate to itself power, and to encroach upon the rights of the citizen, has led to the establishment of salutary rules of construction, limiting their powers to those expressly granted, or arising by reasonable and necessary implication from the grant. It cannot, we think, be assumed that the legislature intended by the language employed to confer power upon the municipality to require work of the class provided for in this ordinance to be done by special assessment, even though it be held to be public work which the municipality is authorized to perform. Such power does not arise by implication from the powers expressly conferred, nor is it essential to the declared objects and purposes of the corporation. We are of opinion that the County Court decided correctly in annulling the assessment and dismissing the petition, and its judgment will be affirmed. . Affirmed.*

Compelling abutting owners to clean or sprinkle streets.—The precise question decided in the foregoing case does not appear to have been elsewhere passed upon. In *Reinken v. Fuehring*, (Ind.) 6 Am. R. R. & Corp. Rep. 82, it was held that compelling abutting owners to pay for cleaning the street upon which their property abutted, by a special assessment, was not a taking of their property without compensation or without due process of law in violation of the Constitution, but in that case the proceeding was expressly authorized by the legislature. Cases on the power of municipalities to compel abutting owners to clean the street or sidewalk in front of their property are referred to in note 6 Am. R. R. & Corp. Rep. 88.

RAGON v. TOLEDO, A. A. & N. M. RY. CO.

(Supreme Court of Michigan, October 27, 1893.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE IN COUPLING CARS. PLEADING AND PROOF. In an action against a railroad company for injuries to a brakeman, it is sufficient, under an averment of the existence of a hole or rut in the track, between the ties, into which plaintiff stepped while making a coupling, to show that the spaces between the ties in the vicinity of the acci-

* Reported in 36 N. E. Rep. 829.

dent were not sufficiently filled by ballast, without proving the existence of any particular hole.

2. CATCHING FOOT IN HOLE BETWEEN TIES. UNBALLASTED SIDE TRACK. NEGLIGENCE OF COMPANY. A railroad company is not guilty of negligence in ballasting a side track so that, while the ties were covered in the middle of the track, at the sides, near the rails, the dirt was two or four inches below the rails, thus leaving holes between the ties.

3. CONTRIBUTORY NEGLIGENCE OF PLAINTIFF. KNOWLEDGE OF DEFECT. FAILURE TO LOOK. One who had been in the employ of a railroad company for some time, passing and repassing a certain side track, cannot recover for injuries received while attempting to uncouple moving cars on such track resulting from a hole in the roadbed which he could have readily seen if he had looked at the track before going on it.

Lyon & Hadsall (Alex. F. Smith, of counsel), for appellant.
Watson & Chapman, for appellee.

HOOKE, Ch. J. The plaintiff, a brakeman upon defendant's freight train, obtained judgment in the Circuit Court for an injury sustained by being run over by his train at Durand. Defendant's counsel contends that the judge should have directed a verdict against the plaintiff. It became necessary to leave a car upon the defendant's side track, and, after setting the switch, the plaintiff signaled to the engineer to back up, which he did, and plaintiff stepped between the car and the tender to uncouple the car. Having some difficulty, and being near the switch, he stepped out, to avoid the danger of walking over the switch bars, entering again after the car had passed them. No one saw the accident, but plaintiff states that he stepped into an unfilled space between the ties, and before he could extricate his foot it was caught by the brake beam of the tender, at the heel, and his toe dragged along the track. At this time he was inside the main track, and, realizing that he was near the frog, he threw himself over the rail, sacrificing his foot rather than his life. At the outset a question of variance arises. The first count of the declaration states that defendant permitted a deep hole or rut to exist in its tracks, into which plaintiff stepped. A second count states it as existing in the side track, between the ties, which space it was defendant's duty to fill with dirt. The alleged variance consists in the failure of the plaintiff to prove the existence of any definite deep hole in the track. He testifies that he did not see the hole, but that he stepped in one, and was caught. He attempts

no description of its size or depth, further than to say that he thought he went down about eight inches, and claims to know there was one only by reason of having stepped into it. He does not fix the exact location of it. Other testimony on the part of the plaintiff tended to show that the spaces between the ties had not been filled with dirt in the vicinity of the place of the accident, and between the place where the foot was cut off and the switch. This testimony fairly tended to prove that the spaces were filled at the middle of the ties, but at the rail the dirt was from two to four inches below the top of the ties. From the very nature of railroads, the hole in the track mentioned in the declaration must have been between the ties, and evidence that for a space of twenty feet or more the ballast did not fill the spaces tended to prove the existence of a number of holes. Upon plaintiff's theory he stepped into but one hole, and the fact that he could not tell just where it was should not prevent recovery of his damages if he were lawfully entitled to them. If it turned out that there were several holes, that fact was not inconsistent with his claim, but tended to support the allegations that a hole existed, and that the spaces were not filled with dirt. It is not a case of proving a number of defects as a ground of inference that another distinct defect existed, but it was showing that several defects existed, one of which might have caused the injury.

This case went to the jury upon two possible theories, viz.: (1) That the plaintiff stepped into the hole, about eight inches deep, in defendant's track, which track was otherwise smooth and in good condition; (2) that the roadbed was in bad condition for want of ballast, leaving places between the ties, into one of which plaintiff stepped, and that his foot was caught by reason of that fact. The first count was supported only by the testimony of the plaintiff, if it can be said to have been supported by proof. He testified that he stepped into a hole about eight inches deep. He said that, so far as he knew, the track was otherwise smooth and in good repair, and that he never saw the hole; that he only knew of its existence by stepping into it. No other evidence in the case shows the existence of any isolated or unusual hole, and this testimony was as consistent with one theory as the other, and

does not tend to establish the theory of an isolated or unusual pitfall; and plaintiff's counsel seem to have relied upon an ability to show a general want of ballast upon the side track in the vicinity of the accident. Hence the jury should not have been permitted to consider this theory. Upon the other theory there was proof that went so far as to show that the side track upon which the accident happened was not ballasted to the top of the ties for their whole length, but that, while the dirt covered the tie in the middle of the track, it sloped towards the sides of the track, so that at the rail it was from two to four inches below the iron, thus exposing the tie at that point to such depth, and that such was the condition in the vicinity of the accident, and had been since the road was constructed. This raises the questions: (1) Should the trial court have determined as matter of law that this road was in a reasonably good condition? (2) Was the plaintiff in a situation to charge his injury upon defendant?

Adjudications are not wanting upon the subject of the duties of masters in relation to the machinery and places for work furnished to servants, and, while a railroad is required to provide reasonably safe appliances, and keep them in repair, and provide a reasonably safe place for the employee, so as not to expose him to unnecessary danger, it is not within the province of courts or juries to prescribe the manner of using its tracks or the character of its appliances by verdicts and judgments which disregard its right to conduct its business in the manner usual with well-managed roads, and as good railroading requires. Accordingly, it has been held that a railroad company is under no legal obligation to maintain for the protection of its employees a station agent at a flag station, where there was an unblocked siding, nor was it bound to change its manner of using brakes or to adopt the most approved methods or appliances, or to discard what are not the safest known. *Hewitt v. Railroad Co.*, 67 Mich. 61; 34 N. W. Rep. 659; *Railroad Co. v. Gildersleeve*, 33 Mich. 133; *Illick v. Railroad Co.*, 67 Mich. 632; 35 N. W. Rep. 708. In the case of *Batterson v. Railway Co.*, 53 Mich. 125; 18 N. W. Rep. 584, a brakeman was injured while coupling cars at a place where the ties were raised above the surface of the ground. It was held that "the

risk of such imperfections was one of the risks of the business. It is not shown or claimed that this track was unsafe for the ordinary uses of side tracks, and the accident did not arise from any such defect. The lay of the land was such as to be readily seen by any one who passed along the track at ordinary times. The plaintiff knew that the roadbed there was not ballasted, and was bound to know that there might be irregularities of surface anywhere. The chances of such accident were not such as to suggest danger as very likely. There was, of course, a probability that cars might have to be coupled at one place as well as another, and sometimes when there was not much daylight. But the company had a right to expect that every brakeman would use reasonable care in examining his footings and surroundings, and we think that they cannot be regarded as at fault for not guarding against an occurrence which was likely to happen in any place where the ground was uneven, and to completely insure against which would require a side track to be as expensively built as a main track. They had a right to rest on the probability that any one would know what was generally to be seen by his own observation, or by information from those who were on the spot working with him, and who might fairly be expected to do their duty." The opinion concludes with the following significant language: "There is much reason to regard the accident, from plaintiff's own testimony, as the immediate consequence of his hand slipping from the car, and of nothing else. But we place no stress upon this, because we do not think any case is made out of a violation of duty to the plaintiff on the part of his employers." In that case the court practically said that a jury should not be permitted to pass upon the question whether a railroad company owed a duty to its employees to ballast its side track where it bordered a pond, asserting that a brakeman ought to expect to be upon his guard against inequalities of surface and uneven places. It will not do to say that this decision was based upon the admitted knowledge of the plaintiff, for the court expressly asserts that no duty existed to ballast the track, for the reason that the company had a right to suppose that its employees could and would see the condition of the track, and govern themselves accordingly, entering between the cars only where it was safe. *Gibson v. Railway Co.*, 63 N. Y. 450, is another case involving the same

principle. A conductor of a freight train, climbing up the outside of a car, was drawn against the roof of a depot. At the close of the plaintiff's evidence defendant's counsel moved for a nonsuit upon the ground that no actionable negligence on the part of the defendant was shown. The court said: "When the deceased entered the employment of the defendant he assumed the usual risks and perils of the service, and also the risks and perils incident to the use of the machinery and property of the defendant, as it then was, so far as such risks were apparent. Accepting service with a knowledge of the character and position of the structure from which the employees might be liable to receive injury, he could not call upon the defendant to make alterations to secure greater safety, or, in case of injury from risks that were apparent, he could not call upon his employer for indemnity." And in the case of *Hayden v. Manufacturing Co.*, 29 Conn. 548, Ellsworth, J., says: "Every manufacturer has the right to choose the machinery to be used in his business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances and run his mill with old or new machinery, just as he may ride in an old or new carriage, or navigate an old or new vessel. The employee having knowledge of the circumstances, and entering service for the stipulated reward, cannot complain of the peculiar tastes or habits of his employer, nor sue him for damages sustained in or resulting from that peculiar service." In *De Forest v. Jewett*, 88 N. Y. 264, a yard in which plaintiff worked was drained by some open ditches running across the road between the ties. He should have seen them, and known about them, and it was held that he could not recover. See, also, *Sweeney v. Envelope Co.*, 2 Cent. Rep. 457. The case of *Gibson v. Railroad Co.*, cited above, has a parallel in the case of *Illick v. Railroad Co.*, 67 Mich. 635; 35 N. W. Rep. 708. This case is even stronger in its support of defendant's contention. A brakeman was climbing a ladder on the car to set a brake which had been called for by the engineer. He was in the line of his duty. He was drawn against a bridge and killed. It was shown that this bridge was narrower than the standard width of bridges in use at the time. The court held as follows: "The bridge was sound and safe for the passage of trains, without defect and in good repair. Whether it was fourteen or

twenty-four feet wide was a matter of no concern to the brakeman, so long as he was not required to occupy a place of danger in the discharge of his duties while passing over it, and this he was not required to do. * * * Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them when they are safe. Any other rule would be both unjust and oppressive. As between the employers and employed, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe, but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects; neither does good railroading require any such thing. * * * I do not think the record discloses any fault or negligence on the part of the defendant." Mr. Justice Cooley states the doctrine thus: "The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent, and were voluntarily assumed by a person capable of understanding and appreciating them. No employer by any implied contract undertakes that his buildings are safe beyond a contingency, or even as safe as those of his neighbors, or that accidents shall not result to those in his service from risks, which perhaps others would guard against more effectually than it is done by him. Neither can a duty rest upon one which can bind him to so extensive a responsibility. There are degrees of safety in buildings which differ in age, construction and state of repair, as there are also in the different methods of conducting business; and these not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises." Cooley Torts, 650.

It would seem that we may from these authorities deduce the principle that obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ, to aid him in such use, and that in so

doing he does not undertake to insure the employee. Upon the theory of this case which we are now discussing we think there was a failure to show negligence on the part of the defendant. The plaintiff was, or ought to have been, familiar with the side track, and, if he was not, common prudence dictated that he should not venture between moving car and engine without first looking under the car to examine the character of the roadbed, all of which defendant had a right to expect of him. See *Gardner v. Railroad Co.*, 58 Mich. 591; 26 N. W. Rep. 301; *Grand v. Railroad Co.*, 83 Mich. 571; 47 N. W. Rep. 837.

Inseparably connected with this question of negligence is the doctrine that "the employee assumes the ordinary risks and perils incident to his employment." It has been impossible to avoid some discussion of it in the foregoing pages. It is a doctrine as well established as any in the books that an employee may contract to use defective machinery, and, where he knows of the defect, and uses the machinery voluntarily, the law warrants the inference that he assumes the incident risks. It must not be assumed that this doctrine gives unlimited immunity to the master. The doctrine is shaded down to cases where the want of knowledge precludes the inference and makes the master liable. But this doctrine does not justify carelessness upon the part of the servant. The master has a right to expect him to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance of the business, machinery and methods which he is employed to use. Actual ignorance will not alone suffice to charge a master. The ignorance must also be excusable. The plaintiff says he supposed the road was smooth, and did not know that there were any holes there. He had been for some time in the defendant's employ, passing and repassing the yard and switch in question. It is plain that the condition of this side track could be seen by a casual observer. Self-preservation should have prompted him to look at this track to see whether it was in such condition as to warrant his going between a moving train and engine, though he had never seen the road before. It was in daylight, and he was not incumbered by a lantern. But, relying upon a supposed condition, he tells us he entered and stepped directly into the hole between the ties. In addition to the authorities cited, see *Shear*.

& R. Neg. § 185; *Foley v. Railway Co.*, 48 Mich. 622; 12 N. W. Rep. 879; *Piquegno v. Railway Co.*, 52 Mich. 40; 17 N. W. Rep. 232; *Hathaway v. Railroad Co.*, 51 Mich. 253; 16 N. W. Rep. 634; *Railroad Co. v. Austin*, 40 Mich. 247; *Viets v. Railway Co.*, 55 Mich. 120; 20 N. W. Rep. 818; *Tuttle v. Railway Co.*, 122 U. S. 189; 7 Sup. Ct. Rep. 1166, and cases cited. The jury should have been directed to find a verdict for the defendant. The judgment will be reversed, and a new trial ordered. Long and Grant, JJ., concurred.

MONTGOMERY, J. This case was once before the court on demurrer to the declaration. Reported in 91 Mich. 379; 51 N. W. Rep. 1004. It was held on demurrer that while "employees may be chargeable with knowledge that side tracks are not always perfect; that they are sometimes constructed over ditches or gullies, and are not always ballasted with the same care that main tracks usually are," yet "railroad companies owe it to their employees to protect them from unnecessary and dangerous pitfalls and unusual conditions." The averment in this declaration was that the railway company permitted a dangerous hole to exist in its track. The case has been tried before a jury and it appears that the nature of the defect consisted simply of a want of proper ballasting, the only fair inference from the testimony being that while the track was ballasted in the center to the top of the ties, at the outer edge and near the rail it was not filled flush with the ties, but that unfilled spaces to the depth of from two to four inches below the rail were allowed to exist. The accident occurred in the daytime when the condition of the track was open to the inspection of the plaintiff. The plaintiff had been in the employ of the defendant for at least six weeks, and his duties would take him back and forth past the place of the injury. He must be presumed to have been aware of the apparent condition of the side track, and it was further his duty to use reasonable care in examining his surroundings before attempting to make the coupling. I think this case falls within the previous adjudications of this court. See *Batterson v. Railway Co.*, 53 Mich. 125; 18 N. W. Rep. 584; *Piquegno v. Railway Co.*, 52 Mich. 40; 17 N. W. Rep. 232. See, also, *Shear. & R. Neg.* § 406. And the Circuit judge should have directed a verdict for the defendant. Judg-

ment reversed and a new trial ordered. McGrath, J., concurred with Montgomery, J.*

1. Railroad companies—injury to brakeman in coupling cars—unballasted side track—negligence of company.—A railroad company owes no duty to a brakeman in its employ to ballast storage or switch tracks so as to prevent his foot being caught between the ties while endeavoring to couple cars. *Finnell v. Delaware, L. & W. R. Co.*, 129 N. Y. 669; 29 N. E. Rep. 825. The court says: "We do not understand that railroad tracks are ballasted for the purpose of making them safe for brakemen to walk upon, but for the purpose of making them firm and safe for the passage of trains, and we do not think the defendant neglected any duty it owed the plaintiff in not ballasting the track at the place where the accident occurred. It is not claimed that there was any trap in the track, or that the track was in any respect defective or dangerous, except in that it was not ballasted. A brakeman is engaged in a business attended with many risks, and it is difficult to see how this recovery can be upheld without casting all the risks of the employment upon the railroad company."

2. Injury by stepping into hole in track while uncoupling cars.—In an action by a brakeman against a railroad company for personal injuries, it appeared that plaintiff was injured by stepping into a hole in the roadbed while uncoupling a car on a side track. It did not appear how long he had been in defendant's employ, or that he ever saw the side track in question before the time of the accident. Held, that it could not be said, as a matter of law, that the injury was caused by a risk of the employment which plaintiff assumed. *Ragon v. Toledo, etc., R. Co.*, 91 Mich. 379; 51 N. W. Rep. 1004. This is apparently a former hearing in the same suit as the principal case.

A switchman who is injured by catching his foot in a space between the planking covering the railroad yards is not entitled to recover damages therefor where, at the time of the accident, he had been working in that yard for six weeks, during all of which time the planking had remained in the same condition. *Gleason v. New York & N. E. R. Co.*, 159 Mass. 68; 34 N. E. Rep. 79.

The fact that a switchman, injured while coupling cars, by reason of a hole in the track, might have selected another place to make the coupling, if he desired, will not defeat his recovery for the injury, unless he knew, or ought to have known, of the danger incurred. *Louisville & N. R. Co. v. Ward*, (Ct. of App.) 61 Fed. Rep. 927.

* Reported in 97 Mich. 265; 56 N. W. Rep. 612.

MATHEWS v. ST. LOUIS & S. F. RY. CO.

(Supreme Court of Missouri, Division No. 2, November 21, 1893.)

1. RAILROAD COMPANIES. FIRES SET BY LOCOMOTIVES. VALIDITY OF STATUTE IMPOSING ABSOLUTE LIABILITY THEREFOR. Revised Statutes of Missouri, 1889, section 2615, making a railroad company absolutely liable in damages for fires communicated by its locomotives, is not unconstitutional as impairing, by subjecting it to an increased burden, the rights given it by its previously granted charter to propel its cars by steam.

2. Nor is the section unconstitutional as denying to a railroad company the equal protection of the laws, nor as depriving it of its property without due process of law.

3. IN AN ACTION UNDER SUCH STATUTE DUE CARE OF THE DEFENDANT IS IMMATERIAL. As the liability imposed on railroad companies by Revised Statutes, 1889, section 2615, for fires set by their locomotives, is an absolute one, a requested instruction, in an action brought under this section, that proof of diligence on the part of the company would relieve it of liability, was properly refused.

4. APPLICABILITY OF SUCH STATUTE TO TREES AND SHRUBBERY. It is no defense to an action against a railroad company for the destruction by fire of certain trees, under Revised Statutes, 1889, section 2615, making railroad companies liable in damages for fires set by their locomotives, and giving them an insurable interest in the property along their routes, that trees were not susceptible of insurance, as the statute makes all kinds of property the subject of insurance. Consequently, error cannot be predicated upon the exclusion of evidence showing the impracticability of insuring such property.

5. CONTRIBUTORY NEGLIGENCE OF DEFENDANT. The fact that plaintiff permitted weeds to remain on his land, adjoining defendant railroad company's right of way, after they had become dried, does not show such contributory negligence as will defeat his right to recover for damages to his property caused by fire set by sparks from one of defendant's locomotives.

6. Under Revised Statutes, 1889, section 2615, giving a railroad company an insurable interest in property along its right of way, no negligence, short of fraud, would bar plaintiff's right to recover.

7. WHETHER COMPANY ENTITLED TO BENEFIT OF INSURANCE RECEIVED BY PLAINTIFF. Though the Revised Statutes of 1889, section 2615, gives a railroad company an insurable interest in the property along its right of way, a railroad company that has not insured such property is not entitled, in an action against it for damages to property by fire set by one of its locomotives, to an abatement to the amount the owner of such property has received from certain insurance companies.

8. EFFECT OF COMPENSATION HAVING BEEN ALLOWED FOR DANGER FROM FIRE WHEN PROPERTY CONDEMNED. In an action against a railroad company for damages to plaintiff's property by fire set by one of defendant's locomotives, it is no defense that, in proceedings for the condemnation of defend-

ant's right of way, plaintiff claimed, and was allowed by the commissioners in their award, compensation for the danger to which his property would be liable from fire "for all time to come."

THIS is an action for damages caused by the destruction and injury to plaintiff's property, a suburban residence and grounds near the city of St. Louis, in St. Louis county, by fire alleged to have been set out by an engine operated by the defendant on its railroad. The petition contains two counts; the first being an action at common law, charging "that on the 9th day of August, 1887, and for a long time prior thereto, defendant negligently suffered a large amount of dry grass, weeds and rubbish to accumulate and remain upon and along its railway and right of way adjoining the land of the plaintiff, and used and employed, in operating said railway, locomotive engines and other machinery that were improperly and negligently constructed, so that sparks of fire could and did needlessly escape said engine," and that by reason of such negligence fire was communicated to said dry grass, weeds and rubbish, and extended to plaintiff's land, and destroyed a dwelling house, barn, outbuildings, personal property therein, trees and shrubbery, of the value of \$30,000, for which judgment is prayed. The second count is based upon the statute (R. S. 1889, § 2615), and charges that the defendant owned and operated a railroad adjoining plaintiff's land, "having locomotive engines in use on the same, and on said 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon said railroad, owned and operated by defendant as aforesaid, to plaintiff's property on his said land," and then avers the destruction of the same property, of the same value as charged in the first count, and avers damages in, and prays judgment for, the same amount.

The answer admits the incorporation of defendant, and the operation of the line of railway described in the petition, and the use of locomotive engines thereon, and denies generally every other allegation in the petition, and then, as special defenses to each count of the petition avers: "(1) That plaintiff has assigned to persons to this defendant unknown his right of action against this defendant, if any he ever had, and is neither a necessary nor proper party plaintiff herein, and is not the real party in interest, and is not, therefore, entitled to maintain or prosecute this

action. (2) That there is a defect of plaintiff, in this, to wit, that the Detroit Fire and Marine Insurance Company, the Commercial Union Insurance Company, and the Imperial Fire Insurance Company, and each and every one of them, are parties in interest in this case, and are necessary parties plaintiff herein. (3) That, on the date and at the time in the petition mentioned, there were growing and standing upon the property in said petition described, adjacent to and continuous from the right of way of defendant to the house, shrubbery and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds and other combustible and highly inflammable matter, which were carelessly and negligently allowed to grow and accumulate upon said premises by and with the knowledge and consent of plaintiff; that the accumulation of dry, combustible and highly inflammable matter as aforesaid had been carelessly and negligently allowed to remain upon said premises for a long time previous to the 9th day of August, 1887, to wit, for many years; that it was gross negligence for plaintiff to allow said dry and combustible matter to accumulate and remain upon his said premises without taking precautions to prevent the spread of fire which might accidentally be set upon the right of way of defendant railway company, or which might accidentally escape from passing engines, which said negligence of plaintiff did proximately and directly contribute to the injuries of which he complains. (4) That the said dwelling house, barn and outbuildings in the petition described were on the 9th day of August, 1887, insured in certain insurance companies named in the answer for the aggregate sum of \$10,000, which, as defendant avers, was greatly in excess of the real value of said dwelling house, barn and outbuildings; that said insurance companies, after the fire in plaintiff's petition alleged, paid to said plaintiff the sum of \$10,000 on account of the loss sustained by reason of the burning of said dwelling house, barn and outbuildings as aforesaid. Wherefore, defendant says that the sum so paid by the said insurance companies as aforesaid should be applied pro tanto to the satisfaction of plaintiff's claim, if any he has, which defendant denies."

And the answer, in addition to the above counts, which are common to both counts of the petition, contains the following counts, which are addressed to the second count of the petition

only: "(5) Defendant avers that the alleged cause of action set forth in the second count of the petition is founded on an act of the legislature of the state of Missouri, entitled 'An act to establish the responsibilities of railroad companies and persons owning or operating railroads for damages by fire communicated by locomotive engines,' approved March 31, 1887, which act defendant avers is illegal, unconstitutional and void, in that it seeks to deprive the defendant of its property without due process of law, and is contrary to the provisions of section 30, article 2, of the Constitution of the state of Missouri. (6) That the said act of the legislature is illegal, unconstitutional and void, in that it denies the defendant the equal protection of the law, contrary to the provisions of section 1, article 14, of the amendments to the Constitution of the United States; and in this, that it deprives defendant of its property without due process of law, contrary to the provisions of article 5 of the amendments to the Constitution of the United States; and in this, that it impairs the obligations of a contract made between the state of Missouri and defendant, by the terms of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel locomotive engines, and cars attached thereto, and be responsible only for the negligent and careless use thereof; and is contrary to the provisions of article 1, section 10, of the Constitution of the United States. (7) That heretofore, to wit, on the 1st day of June, A. D. 1882, the plaintiff was the owner of the land described in his petition, and also of a certain strip of land along and adjacent to the west side of said tract, 100 feet wide, being the same strip of land now occupied by defendant's roadbed and right of way, and that defendant was desirous of building its road upon said strip. That plaintiff and defendant could not agree as to the amount of compensation to be paid to plaintiff for said strip, and defendant commenced proceedings in the Circuit Court of St. Louis county against plaintiff, the object and nature of which was to condemn a right of way upon said strip, and through and along plaintiff's said land. That commissioners were duly appointed by said Circuit Court of St. Louis county, before whom the matter of compensation of plaintiff was to be heard, and before whom was then and there pending, among other things, the question of how much compensation plaintiff

should receive from defendant — First, for actual amount of ground taken ; second, for the injury to the property as a place of residence, caused by running the road where it now runs ; third, for cutting up or dividing the property then owned by plaintiff into detached portions ; fourth, for danger of fire for all time to come. That thereafter, to wit, on the 1st day of July, A. D. 1882, the said matters so pending before said commissioners were all compromised and settled between plaintiff and defendant upon the agreement that in consideration of all of said matters the defendant should pay plaintiff the sum of nine thousand dollars, in full payment, settlement, accord and satisfaction of said right of way and said strip of land, and all the matters and things so pending before said commissioners as aforesaid. That thereafter, to wit, on the 15th day of July, A. D. 1882, defendant, for the consideration aforesaid, paid to said Leonard Mathews, and said Leonard Mathews received from the defendant the said sum of nine thousand dollars, pursuant to and in compliance with said contract and agreement. Wherefore, defendant says the plaintiff ought not to prosecute or maintain said cause of action in said second count set out.”

The replication was a general denial of all new matter set up in the answer.

Upon the trial, and when the plaintiff first offered testimony in his behalf, the defendant objected to the introduction of any testimony for the reasons : “ (1) That the petition does not state a cause of action ; (2) that, in the first count, plaintiff has not specifically pleaded ; (3) that he has combined two causes of action in one count, involving different rules of evidence and different measures of damage ; (4) that the law on which the second count is based is unconstitutional.” These objections were overruled, and exceptions duly saved by defendant, and thereupon defendant moved the court to require plaintiff to elect between the two counts in his petition, “ because the measure of damages in the alleged causes of action set forth in said petition are totally different, and because a different, and not the same, proof is required to support each of the said alleged causes of action.” This motion was by the court overruled, and exception duly saved by defendant.

The testimony on the part of plaintiff tended to show that

the plaintiff was the owner of a piece of real estate lying between the Pacific railroad on the north, and the St. Louis and San Francisco railway on the south, Holmes avenue on the west, and the property of Anderson on the east; the northern part of this tract, containing about eleven and one-half acres, and lying between the Pacific railroad and Elliott avenue, was called the "Home Place," and was bounded by osage orange hedges on the south, east and west. This home place had been improved and planted on plans prepared by a landscape gardener, and contained a large assortment of all kinds of ornamental trees, shrubbery and plants, as well as fruit trees and vines. There was on it a large dwelling of nineteen rooms — the front or main building made of concrete, and the rear building of frame in imitation of stone; also, a large barn, of seventy-five feet in length by thirty feet in width, with a bowling alley therein and a cow shed attachment. There were also one or more outbuildings of no very considerable value, and in the house, barn and bowling alley some personal property to the amount of probably \$200 or \$300 in value. As is generally the case, the testimony as to the value of this house and barn, and of the property as a whole, with its improvements by planting, etc., was conflicting, plaintiff's witnesses putting the value of the house and barn alone as high as \$18,000, and the value of the shrubbery, etc., destroyed, as high as \$6,000. On the afternoon of August 9, 1887, at a time when everything was very dry, a fire started along the railroad track and on the railroad right of way adjoining plaintiff's property, and at a point southeast of the barn, and was carried by a south or southeast wind, with great rapidity, into plaintiff's property, set fire to the barn, and then to the house and outbuildings, and ran pretty much over the whole place, destroying the buildings and much the larger part of the trees, plants, shrubbery, vines, etc. Albert B. Chandler testified: He was at home, south of the railroad, opposite Mr. Mathews' place, on the day of the fire. It started near where Elliott avenue crosses the railroad, and swept up the railroad bank there and caught the Mathews barn and burned it down, and the shingles flew from the barn and burned the house. After the fire he went down and saw ashes on the track, and saw where the fire had burned up the bank. He stirred the ashes, and there were a few coals. When he first observed the fire it was going up the rail-

road bank. Samuel K. Harding testified that on the 9th day of August, 1887, he was a brakeman in the employ of the defendant, and on that day was braking on a train which was called the "Hoodlum," and which passed plaintiff's place about two o'clock in the afternoon, and when it passed there he was on the rear part of the train, and saw some grass on fire on the defendant's right of way, opposite the Mathews place, about six or eight feet from the ends of the ties, on the bank in the cut. This fire was about three feet across. The engine gave out a great many sparks. He had noticed before that it gave out sparks. He had been running on that train since the first of August. The place was occupied by plaintiff as a residence up to 1880, when he removed to St. Louis, leaving a man named Cleary in charge of the place. Cleary lived in the back part of the house, and took care of the place till 1883, when it was rented to a Mr. Wright, who lived there until September, 1884, from which time until the fire the place was vacant, except that some member of plaintiff's family would go out once in a while, and sometimes stay all night, and sometimes a week or two. After the fire plaintiff sold the place for \$9,000. There was verdict and judgment for plaintiff for \$11,000. In due time motions for new trial and in arrest of judgment were filed, heard and overruled, and defendant appealed to this court.

E. D. Kenna, for appellant. *John G. Chandler*, for respondent.

GANTT, P. J. (*after stating the facts*). 1. Among the grounds assigned for the reversal of the judgment of the Circuit Court is the unconstitutionality of section 2615 of the Revised Statutes of 1889 (Laws 1887, p. 101), which is as follows: "Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages." It is argued by counsel that this

act is unconstitutional for three reasons: "It impairs the obligation of a contract; it deprives defendant of its property without due process of law; it denies to defendant the equal protection of the laws." The defendant is a railroad corporation organized under the general laws of this state on the 10th of September, 1875, and prior to the passage of section 2615. The contention of the defendant raises a question of prime importance, and has received our most careful consideration.

Does section 2615 impair the obligation of the contract made by the state in the grant of defendant's charter? The claim is that it interferes with the right of defendant, granted in the sixth paragraph of section 2543, Revised Statutes 1889, to propel its cars by steam, in subjecting it to an increased burden or liability for fires set out by its locomotives. Said paragraph is as follows: "Sixth. To take and convey persons and property on their railroad by the power or force of steam or of animals, or by any mechanical power, and to receive compensation therefor." Defendant insists that because there was no statute in force at the time it was organized which would render it liable for damages by fire in the absence of proof or presumption that it had been guilty of negligence in the operation of its trains, the construction of its engines or the care of its right of way, and because the decisions of this court prior to the adoption of this section had never held it liable in such cases save for negligence, the law on this subject, as then understood, became part of its charter, and hence inviolable under the Constitution of the United States.

It is wholly unnecessary to review the decisions which sustain the view adopted in the Dartmouth College case — that defendant's charter is a contract between it and the state. It has been uniformly followed by this court. This ground has been gone over so often, and this limitation so thoroughly discussed, that nothing new can be said on the subject. Says Judge Cooley, in his great work on Constitutional Limitations (6th ed. chap. 16, pp. 707, 708): "The occasions to consider this subject in its bearings upon the clause of the Constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held, without dissent, that this clause does not so far remove from state control the rights and properties which depend for their

certain evidence. It offered to prove by Howard Blossom, an insurance agent, that trees, shrubs, plants and vines were, by their inherent nature, not susceptible of insurance, and it was impracticable, from a business standpoint, to insure such classes of property, and why it is so impracticable. Upon objection that this evidence was immaterial and irrelevant, the court excluded it, and defendant excepted. It is not contended by defendant that "trees, shrubs, plants and vines" are not property, often of great value, and that, as such, they would not be included in the general term "property," used in the statute, but it urges that such property is not insurable. Its offer was to show that the inherent nature of such property is uninsurable. The act under consideration is not limited to any specific property. It is broad enough to include both real and personal property. The statute is an enabling act. By its terms the property becomes a subject of insurance. The mere fact that no person has as yet applied for insurance upon growing timber and ornamental shrubs would not meet the case. This character of property is of inherent value, adds greatly to the value of realty, and certainly is not more subject to change than ordinary personal property, which is clearly insurable. That this class of property is subject to destruction by fire all must admit, and no valid reason appears why it may not be insured. We take it that it is not an open question under this statute, and no error was committed in declining to hear the evidence offered. The judge and jury would be as competent to respond to that question as any witness. Such property was held clearly within a similar statute in Maine and insurable in *Pratt v. Railroad Co.*, 42 Maine, 579, a case much later than that cited by defendant from 37 Maine, 92, and following *Hart v. Railroad Co.*, 13 Metc. (Mass.) 99. Chief Justice Bigelow, in *Ross v. Railroad Co.*, 6 Allen, 87, pointed out the difficulties in which the Supreme Court of Maine had become involved by attempting to confine the right of recovery to permanent property, and repudiated any such limited construction. He maintained that the statute was broad enough to cover every species of property, and the claim for indemnity was as strong in one as in the other. The evidence, if permitted, would have led to a distinction unauthorized by anything in the statute, which is remedial in its nature,

and not to be strictly construed against those for whose benefit it was enacted. It becomes unnecessary to say more in regard to the point that the personal property in the house was not insurable. The personal property that was burned was stored in the residence and barn, and no reason is given why it was not insurable. The defendant's point as to this is not sustained.

4. On the trial defendant introduced witnesses who testified that they lived in the neighborhood of the Mathews home place; that it had been neglected for years prior to August 9, 1887, and no care taken of it except to mow the meadow and lawn around the house; that the garden, nursery and orchard had been permitted to grow up in weeds, some of which were two or three years old, and on the day of the fire were very dry; that the place was a resort for boys, who frequented it to swim in the pond, and in the fall to hunt; that the weeds and inflammable material at the southeast corner, near the nursery, ran right down to the defendant's right of way. At the conclusion of the evidence defendant asked two instructions to the effect that the conduct of plaintiff in permitting these weeds to grow on his place, as above testified, constituted such contributory negligence as would prevent plaintiff's recovery, or, if such weeds augmented the loss, he could only recover for so much of the injury as would have followed had he not been negligent in that regard: The Circuit Court declined to give either of said instructions, and defendant complains of that ruling. The instructions are predicated on the fact that the jury should first find that the fire was communicated by defendant's engine to this grass or weeds, but assumes that it was contributory negligence in plaintiff to permit these weeds to grow upon his land in this manner. This question has often been before this court, beginning with *Fitch v. Railroad Co.*, 45 Mo. 322; and it has uniformly been ruled that it was not contributory negligence in a farmer to permit dead and dry grass to remain in his fields adjoining the right of way, "especially," as was said in *Patton v. Railway Co.*, 87 Mo. 117, "where there is no evidence that this is out of the usual course of husbandry." These decisions of this court are amply supported by both reason and authority in other states. In *Railroad Co. v. Medley*, 75 Va. 499, Judge Waller R. Staples delivered the opinion of the court. It appeared in that case that

the plaintiff's land was covered with dry grass and broom sedge; that this grass was of a highly combustible nature and easily ignited. The point was made that plaintiff was guilty of contributory negligence, but the court held otherwise, saying: "The legislature, in legalizing the use of engines running through the country, scattering fire and cinders on all sides over lands in the vicinity of the road, certainly did not intend to impose any additional burdens or duties upon the owners of such lands." "They are subject only to such risks as are necessarily incidental to the proper and legitimate operation of the road by those having charge of it." "Any other rule would impose upon property holders near the line of a railroad the necessity of removing their grain, hay and whatever is of a combustible nature, to some distant point, not infrequently, of changing the whole course of husbandry, of incurring enormous expenses, and of exercising ceaseless vigilance, in order that the company may negligently permit the accumulation of dangerously inflammable matter upon its own lands, liable at any moment to be ignited from its own locomotives." "It has been well said that fire is an extremely dangerous element, even when employed for a lawful purpose. The exercise of due care is imposed on him who uses it and sets it in motion for his own advantage, and not upon him who is merely passive, confining himself to lawful employment and business in the conduct of his own affairs." "There are some few cases holding a contrary doctrine, but the great weight of authority is in conformity with the views here expressed. I refer particularly to an exhaustive discussion of the whole subject by Chief Justice Dixon in *Kellogg v. Railroad Co.*, 26 Wis. 223; also, to a very able opinion of Judge Haymond in *Snyder v. Railway Co.*, 11 W. Va. 14; *Salmon v. Railway Co.*, 38 N. J. Law, 5, and 39 N. J. Law, 299." In *Railroad Co. v. Schultz*, 93 Penn. St. 341, the Supreme Court of Pennsylvania characterized the claim of defendant that plaintiff was guilty of contributory negligence because he permitted dry leaves, brushwood and other rubbish on his property, which could be readily fired by sparks from its locomotive, as "an extraordinary proposition," assigning, among other reasons, that "it was an attempt to impose upon property owners along the line of a railroad duties unknown and unnecessary before the building of the road," and, "if this proposition means anything it means

that upon such property owners devolves the duty of guarding against the negligence of railroad companies and their servants, which is absurd ;” and citing Judge Agnew’s opinion in *Railway Co. v. Hendrickson*, 80 Penn. St. 182. See, also, *Railroad Co. v. Jones*, 86 Ind. 496 ; *Vaughan v. Railroad Co.*, 3 Hurl. & N. 750 ; *Railway Co. v. Hixon*, 79 Ind. 111. It will be observed that defendant’s own witnesses testified to the mowing of the grass and meadow, and the only accumulation was in the nursery, garden, vineyard and orchard. As remarked in *Patton’s Case*, *supra*, there was no evidence whatever that it was not customary, or even proper, at times, to let weeds grow. Certainly, it cannot be affirmed that weeds, even, are not often put to a most useful purpose, in mulching and manuring. In any aspect of the case, we think there was nothing showing contributory negligence by the plaintiff. But there is another ground upon which this plea should have been denied, and that is by virtue of section 2615 the defendant is made an insurer against fire set out by its engines ; and it is a familiar rule that contributory negligence, short of fraud, does not furnish any defense to an action by the insured on his policy of insurance, and this was the view taken and enforced in *Rowell v. Railroad Co.*, 57 N. H. 132.

5. In this connection we are called upon to consider the position taken by defendant in the fourth paragraph of its answer, which is, in brief, that, at the time of the fire, plaintiff was insured in certain insurance companies to the amount of \$10,000 ; that after said fire said companies paid said loss of \$10,000. Wherefore, defendant prays that the insurance money so paid to plaintiff by said insurance companies shall be applied pro tanto to the damages sued for in this case. The defendant is most clearly not entitled to any benefit of the insurance money which accrued to plaintiff by reason of defendant’s own act in destroying the insured property. In *Dillon v. Hunt*, 105 Mo. 154 ; 16 S. W. Rep. 516, this division held the rule as stated in 1 Suth. Dam. 242 (ed. 1882), to be correct, viz. : “ That there can be no abatement of damages on the principle of partial compensation received for the injury, when it comes from a collateral source, wholly independent of the defendant, and is, as to him, *res inter alios acta*. The payment of such moneys not being procured by the defendant, and they not having been paid or received to satisfy in whole or in

part his liability, he can derive no benefit therefrom, in mitigation of damages for which he is liable. To permit a reduction on such a ground would be to allow a wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." A similar conclusion had previously been reached in *Carroll v. Railway Co.*, 88 Mo. 239, to which our attention was not called at the time. Although an insurer, defendant, having itself destroyed the property, has no right to share the immunity afforded other insurers. Their relation as to this loss is entirely antagonistic to it. The defendant's liability is first and principal; that of the insurance companies, secondary. Plaintiff and the insurance companies who paid his loss stand opposed to defendant, who was the cause of loss to both. There is no contractual relation or principle of subrogation that will enable defendant to require of them that they shall share their losses pro tanto with it. The statute points out the way by which it may protect itself against the loss. It confers on it an insurable interest in the property, and only by availing itself of this right can it guard against those losses which occur by fires put out by it on the lands of adjoining owners. *May Ins. § 455*; *Harding v. Townshend*, 43 Vt. 536; *The Monticello v. Mollison*, 17 How. 152; *Hammond v. Schiff*, 100 N. C. 161; 6 S. E. Rep. 753; *Hart v. Railroad Co.*, 13 Metc. (Mass.) 105; *Ross v. Railroad Co.*, 6 Allen, 90.

6. At the trial, defendant offered to prove that its right of way was a portion of the property described in plaintiff's petition; that when its railroad was built through plaintiff's premises, in 1882, condemnation proceedings were instituted against plaintiff, to which he was made a party; that before the commissioners appointed to assess plaintiff's damages, among other items of damage caused by defendant's road, plaintiff claimed, as one, "damage of fire for all time to come." Defendant then offered to show by H. W. Hough and W. T. Essex, two of said commissioners, that they awarded plaintiff, for his damages to all his property, \$9,000, and for this home place they assessed the damage at \$3,000; that in estimating the damage they took into consideration the danger to said property from accidental fire set out by engines on the railroad; that plaintiff and defendant finally agreed to abide the award, and the damages were accordingly paid. The court was requested to charge the jury, in the second instruction prayed by

defendant and refused by the court, that if the commissioners did assess the damages, and in so doing took into consideration the danger to plaintiff's property by accidental fire, and said danger was also considered by plaintiff and defendant, then plaintiff cannot recover, provided such proceedings and compromise were had prior to March 31, 1887. When a part of a tract of land is taken for railroad purposes under condemnation proceedings, the jury or commissioners may properly take into consideration the risk from fire to the buildings, fences, timber or crops upon the remainder, in so far and to the extent, only, that it depreciates the value of the property; but compensation for a probable or future loss by fire is entirely too speculative and remote to be made the basis of damages. As said in *Railway Co. v. McGrew*, 104 Mo. 282, loc. cit. 294; 15 S. W. Rep. 931: "It would not be proper to estimate the possible damage from fires or injuries to persons." "Neither may ever occur, and to take them into the estimate would be mere speculation." "We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further." Lewis Em. Dom. § 497; Mills Em. Dom. §§ 163-166; *Railroad Co. v. McComb*, 60 Maine, 290; *Adden v. Railroad Co.*, 5 N. H. 413; *Railway Co. v. McCloskey*, 110 Penn. St. 436; 1 Atl. Rep. 555. The plaintiff's claim before the commissioners was damage from the risk of fire. In so far as that risk affected the value of his property not taken, by depreciating it, it was a proper claim. There was nothing to show that it was unjustly extended to an estimate of damages that might accrue at some future time, or might never occur. The damages assessed were \$3,000, and paid. After the assessment, then, plaintiff held his property in its depreciated condition. How defendant can arrive at the conclusion that if this property, in its depreciated condition, is subsequently destroyed, plaintiff is not entitled to recover whatever damages shall accrue from such subsequent destruction, we cannot understand. The prior condemnation assessment has been made and settled. After that, plaintiff owns what is left, absolutely, as he owned the whole before a portion was appropriated by the road. The subsequent damages constitute no part of the first. It is not double damages, in any sense, as we view it. If the property is destroyed by negligence,

there can be no question of the liability of the company for burning it, nor is it material, under section 2615, whether it was the result of negligence or pure accident. The statute operates upon the estate as it is when the fire occurs, and, as we hold the statute valid, the company is liable. *Railroad Co. v. McComb*, 60 Maine, 290; *Adden v. Railroad Co.*, 55 N. H. 413; *Grissell v. Railroad Co.*, (Conn.) 9 Atl. Rep. 137; *Pierce v. Railroad Co.*, 105 Mass. 199; *Lyman v. Railroad Corp.*, 4 Cush. 288. We find no error in the judgment of the Circuit Court, and accordingly affirm it. Burgess, J., concurs; Sherwood, J., dissents.*

1. Railroad companies—validity of statute rendering them absolutely liable for damages by fires communicated by its locomotives.—The validity of such a statute is sustained in *McCandless v. Richmond & D. R. Co.*, (S. C.) 7 Am. R. R. & Corp. Rep. 366; *Regan v. New York & N. E. R. Co.*, 60 Conn. 124; 22 Atl. Rep. 503; *Martin v. New York & N. E. R. Co.*, 62 Conn. 331; 25 Atl. Rep. 239. A statute rendering a railroad company liable for stock killed, irrespective of negligence or breach of duty on its part, was held void in *Wadsworth v. Union Pacific R. Co.*, (Col.) 8 Am. R. R. & Corp. Rep. 127.

2. Railroad company not entitled to benefit of insurance procured and collected by plaintiff on the property destroyed.—This precise question is elaborately considered in *Regan v. New York & N. E. R. Co.*, 60 Conn. 124; 22 Atl. Rep. 503, where the suit was under a similar statute, and the same conclusion reached as in the principal case. The court cites the following authorities in support of its ruling: *Mutual Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265; *Hart v. Railroad Co.*, 13 Met. 99; *Mason v. Saintsbury*, 3 Doug. 61; *Clark v. Inhabitants of Hundred of Blything*, 3 Dow. & R. 489; 2 Barn. & C. 254; *Yates v. White*, 4 Bing. N. C. 272; *Randal v. Cochran*, 1 Ves. Sr. 98; *Assurance Co. v. Lister*, L. R., 9 Ch. App. 483; *The Monticello v. Mollison*, 17 How. 152; *Hall v. Railroad Co.*, 13 Wall. 367; *Clark v. Wilson*, 103 Mass. 219; *Hayward v. Cain*, 105 Mass. 213; *Harding v. Town of Townshend*, 43 Vt. 536; *Insurance Co. v. Hutchinson*, 21 N. J. Eq. 107; *Weber v. Railroad Co.*, 35 N. J. Law, 409; *Same v. Same*, 36 N. J. Law, 213; *Collins v. Railroad Co.*, 5 Hun, 503; *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 10 Hun, 59; *Merrick v. Brainard*, 38 Barb. 574; *Althorp v. Wolfe*, 22 N. Y. 355; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Carpenter v. Transportation Co.*, 71 N. Y. 574; *Briggs v. Railroad Co.*, 72 N. Y. 26; *Gates v. Hailman*, 11 Penn. St. 515; *Insurance v. Bosher*, 39 Maine, 253; *Disbrow v. Jones*, Har. (Mich.) 48; *Sherlock v. Alling*, 44 Ind. 184; *Swarthout v. Railroad Co.*, 49 Wis. 625; 6 N. W. Rep. 314; *Pratt v. Radford*, 52 Wis. 114; 8 N. W. Rep. 606; *Honore v. Insurance Co.*, 51 Ill. 414; 1 Suth. Dam. 242; *Wood's Mayne Dam.* p. 155, § 114..

* Reported in 24 S. W. Rep. 591.

BITTLE v. CAMDEN & A. R. Co.

(Court of Errors and Appeals of New Jersey, January 18, 1894.)

1. RAILROAD COMPANIES. LIABILITY FOR NEGLIGENCE IN THE GIVING OF STATUTORY SIGNALS. FRIGHTENING HORSES. A railroad company is bound to use ordinary care and prudence in giving statutory signals of the approach of its trains towards a station and crossing, and in passing them, or whenever, at any given point, such signals are allowed or required to be given; and negligence in the exercise of its right and duty in this respect is actionable negligence.

2. The court will take judicial cognizance that the blowing of a whistle is one of the signals used in operating and running a railroad train, and that it is authorized and required in approaching stations and crossings, and in passing them; yet, if it be done negligently, wantonly or maliciously, such negligence, wantonness or maliciousness is actionable if injury results therefrom.

ACTION for personal injuries by George W. Bittle against the Camden and Atlantic Railroad Company. There was judgment of nonsuit, and plaintiff brings error.

John W. Wescott, for plaintiff in error. *Samuel H. Grey*, for defendant in error.

LIPPINCOTT, J. The plaintiff below, who is also the plaintiff in error, sued the Camden and Atlantic Railroad Company to recover damages for personal injuries. The evidence on the part of the plaintiff shows that the accident out of which the injuries to the plaintiff arose occurred in Berlin, in the county of Camden, on March 23, 1891, about five o'clock in the afternoon. The plaintiff was, with a horse and wagon, engaged near the station at Berlin in unloading manure from a freight car of the defendants on a side track, and carting the same to a field not far away. On one of these trips he had loaded the wagon with manure, and had gotten off the car to drive away with his load to the field, when his attention was called to the fact of an approaching train on its way from Philadelphia to Atlantic City. The load on the wagon was nearly a ton in weight, and his horse was a young and spirited animal, but one which, to a considerable extent, by the evidence, had been accustomed to cars, and not ordinarily scared by them. He was, with his horse and wagon, about seventy-five yards away from the main tracks

near a siding upon which the freight cars holding the manure were standing, which siding ran nearly parallel with the main track on which the passenger train was approaching, and the roadway or other way upon which he was to drive with his load ran about parallel with these tracks, and in the same direction in which the train was going. The evidence shows that from this point he could not be seen by the engineer of an approaching train until the train came nearly or about opposite to the point where he was engaged. When the plaintiff's attention was called to an approaching train he took hold of the head of his horse, and was in the act of leading him along this roadway in which he was to go on his way to the field, and, while doing this, the train, which was somewhat behind time, came along and passed the station at a high rate of speed. The evidence on the part of the plaintiff does not show that the whistle blew, or the bell rang, before this point was reached. The evidence on the part of plaintiff, in substance, shows that as the train came to this point the engineer leaned out of the cab window, looked at the plaintiff holding his horse by the head, and then suddenly reached up and opened the valve, and blew a loud, shrill whistle, which so frightened the horse that it became entirely unmanageable, and the plaintiff, in his efforts to control it and prevent it from running away, was very seriously injured. The situation, by the evidence, appeared to be that there is an east-bound and a west-bound main track passing this station. The station faces the north, and the main tracks are in front of the station. Some short distance west of the station, Taunton avenue, a public highway, crosses the tracks at right angles. Immediately at the station, Jackson street, a public highway, crosses the tracks at right angles. About 100 yards east of the station there is also another crossing, called "Bishop's Crossing," also a highway; and still further east, nearly a half mile away, there is another crossing, called "Bishop's Road." Back of the station, on the south side, nearly seventy-five yards away, was the side track on which the carload of manure was standing, from which the defendant was loading his wagon. The side track was nearly parallel with the main track, deflecting a little to the south.

Upon the manner in which the whistle was blown, the plaintiff testifies that, when his wagon was loaded, he got off the car on

the ground, and took the horse by the head, and started out away from the car to go to the field with his load, when his attention was called to the approaching train; that the Jackson street crossing is at the end of the station. This was the point opposite which the plaintiff was holding his horse; and he says: "I didn't think of them blowing the whistle there, because he was just beyond the crossing when he blowed the whistle, and he was looking with his head out of the cab window, and saw me, and he was smiling; and he just reached up and pulled his whistle, as I call it, 'wide open,' and the instant he done that she jumped." In another place in his evidence he says: "As soon as he saw me he reached right up and pulled the whistle," and that he never heard a shriller whistle in his life; that it was "a great deal louder than the usual whistle, and that it was so blown for two hundred yards;" and he further says, so far as his hearing was concerned, the whistle did not blow until the train was just beyond the crossing at Jackson street, opposite the point where the plaintiff was with his horse and wagon, and that the whistle has never since been blown at this point; and that, at the time it was blown in this manner, there was nothing on the track ahead to provoke such a whistle. It may be well said that there exists, if this evidence be true, a question whether there was not only negligence, but wantonness, on the part of the engineer in blowing this whistle as he did. Mr. Minnard, a witness, who lives opposite, and about seventy feet from the station, a little beyond the easterly end, testifies that he was back of his house when he first heard the locomotive whistle, and that it sounded like a cattle call, and he supposed it was such, and started around the end of his house, when his wife met him, and told him that a horse was running away; that there was no way of measuring the sound of the whistle, but that it was a cattle call — a loud, shrill whistle; that it was a great many times louder than the ordinary blow on approaching a station, or what they used to blow on approaching. He thought somebody was on the track, and he started, supposing some one was on the track. The train was running at such rate of speed that, before he got around his house, it was a mile and a half away. He then describes the efforts of the plaintiff to control the horse, and that he would not have attempted its control for all the horses in the county. Harry Beckly, another witness,

whose attention was called to the matter when the horse started, and while he had no occasion before that time to note the particulars, testifies that he saw a man have his head out of the cab window, and that he blew the whistle. He described it as being louder than usual, but otherwise took no note of it, except that the whistle did not blow till the engine was opposite the house of Mr. Minnard. Arthur W. Robinson, a witness, was unloading a freight car next to the car from which the plaintiff was unloading; described the whistle as "a long, loud blow;" that "it was an uncommonly loud blow—loud and long;" and that he never heard a train blow in that place before. This witness states that he heard no whistle blow upon the approach of this train towards the station and crossings there. William Boardly, a witness, described the whistle as a "real loud blow;" that it was a quick, loud blow—louder than he had heard before; that when the whistle "burst out," as he describes it, he looked up, and saw a man hold of the whistle, with his head out of the cab window; that he was looking towards the plaintiff, and that he looked as if he was laughing. Harry Bittle swears that the whistle has not blown at this place since. There is much other evidence on the part of the plaintiff as to the situation of the crossings—the number of them, and the distance apart—the location of the main tracks, and the side track upon which the freight car stood. There is some evidence to show that the engineer, on approaching this station, could not see the plaintiff in the position in which he was with his horse and wagon, but at the point where the witnesses identify this unusual blowing of the whistle there appears to have been no difficulty in this respect. The plaintiff, with his horse and wagon, was in plain view of the engineer, or other person in the cab, looking from the cab window. At the close of the evidence the defendant moved a nonsuit, which was granted on three grounds: First, that the blowing of this whistle at this place where it was blown was not an unlawful act of the defendant, in view of statutory authority in this respect, and that the company was authorized to blow the whistle in this place; and, secondly, that there was nothing peculiar about the blowing of the whistle which made it unlawful, or constituted the manner of its blowing actionable negligence; that the only question raised upon this point was whether the whistle blown

was the one ordinary to be blown at this crossing or place, or whether it had an audibility which to one witness created the idea that there was something on the track ahead of the train, and whether the distinction between those two degrees of whistling constituted actionable negligence. The trial court held that these were questions of law, and to be determined by the court, and they were determined in favor of the defendant. Besides these two points, the further finding of the court was that, even if the engineer was negligent, still there existed contributory negligence on the part of the plaintiff; that, if there was negligence on the part of the engineer, still that negligence was shared by the plaintiff, in that the engineer saw all that could be seen, and saw nothing more than the plaintiff knew himself; or, in other words, he saw a man who thought he had his horse under management, leading the horse in a manner which ordinarily does give a man such control. So that if there was a mistake in judgment — if there was negligence in the judgment — on the part of the engineer, it was negligence which was fully shared by the plaintiff. If, therefore, there was negligence, the negligence of the engineer and the plaintiff was identical. Both thought, and had a right to think, the same thing, except that the plaintiff knew what he was thinking about, and the engineer could not know what the plaintiff thought, and that it was a case in which, whatever the negligence of the engineer, he borrowed it from the plaintiff, and he was no more nor less negligent than the plaintiff, and their negligence resulted from precisely the same failure to foresee exactly what the horse would do under such blowing as the whistle might give at that place and under the circumstances. Upon these grounds the trial justice at the Circuit nonsuited the plaintiff.

Upon a review of this case the conclusion is that, under the statute authorizing the points and distances at and for which either a whistle shall be blown or a bell rung, the defendant had the right to blow this whistle at this point. The statutory signal was required here, and by force of the statute, considering the proximity of these crossings to each other, it became the duty of the defendant to ring the bell or blow the whistle, and continue to do so until the engine had crossed the three first streets or highways named, and their duty was performed when either the

whistle was so blown or the bell so rung, and such duty, if properly performed, could not be made the source of complaint, whatever might be the results; but to fully comply with such statutory duty, and free itself from fault, the defendant was compelled to commence the blowing of such whistle at the point provided by the statute, and continue it over the space provided. Now, there is evidence here on the part of the plaintiff — and considerable of it, too — that neither the bell was heard to ring nor the whistle to blow until the point of accident was reached. If this be true, the defendant did not comply with the statutory requirements as to warning signals in approaching these crossings, and it is difficult to perceive why this element of negligence in this case should not have been submitted to the jury. Revision, p. 910, § 6. The plaintiff in this case, under the circumstances in which he was placed, might perhaps be well entitled to this warning. *Railroad Co. v. Leaman*, 54 N. J. Law, 202; 23 Atl. Rep. 691. Then, again, if no whistle was blown until Jackson street crossing was reached, as appears by some of the evidence, and then there was a sudden call, no previous warning being given, the question arises whether also this fact, so far as it affects the plaintiff, should not have been submitted to the jury upon the inquiry as to the existence of negligence of the defendant in the performance of its duty to the plaintiff. But these considerations do not appear to have entered into the holding of the trial justice upon the motion to nonsuit, and are not deemed necessary to be discussed in this review.

Thus, while the legal right to blow the whistle at this point may be conceded, yet it does not by any means follow that this right could be exercised in a negligent, heedless or wanton manner by the servants of the defendant, resulting in an injury to the plaintiff; and this, as the case is presented, appears to be the difficulty. The question here is whether this whistle was so negligently, needlessly or wantonly blown as to have caused this injury to the plaintiff. Abstractly, this question, in any given case where an inference of this character may be reasonably drawn from the evidence, should be committed to the jury for its decision, and not assumed by the court. It is not necessary to repeat the circumstances of the accident. One fact upon the evidence seems to be clear, whether the whistle was blown or not,

or continuously or not, before the point of accident was reached, and that is that the engineer, while apparently looking at the plaintiff, who, with his horse and wagon, was in full view, holding his horse, or leading him in the usual manner along the way provided, reached up and gave to his whistle an extra force of sound, shrill and loud — louder and shriller than ever was heard before. It is described as a cattle call by one witness — a call which is usually made when cattle are upon the track ahead of the train, or a call by reason of some sudden danger. This accident was apparently the result of this manner of sounding this whistle. There is no evidence in the case at this point that such a sounding of the whistle was called for by any danger to the train whatever from obstructions ahead of it on or near the track. The plaintiff with his horse was in no situation of danger, and it must be said with some degree of emphasis that, upon the evidence as it stood at the close of the plaintiff's case, there was every appearance of negligence and heedlessness, if not wantonness, in the act of blowing this whistle in the manner in which it was blown. It must be that the defendant is bound to use reasonable care and prudence in giving statutory signals of the approach of a train, or its existence, at any given point where such signal may be allowed or required. Negligence in the exercise of a lawful right is actionable if it causes injury. It is no excuse or justification that an act occasioning injury was itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. *Railroad Co. v. Barnett*, 59 Penn. St. 259. This is quite aside from the question whether blowing at this point could do any good or not. It was their legislative duty to blow the whistle, and it cannot be said that legal injury can arise from the proper performance of this duty; but the pregnant question always is whether, under all the circumstances of the case, reasonable care has been used in the exercise of legislative right and the performance of the legislative duty. A negligent exercise of the right, or the negligent performance of the duty, can in no event be excused. *Bradly v. Railroad Co.*, 2 Cush. 539; *Linfield v. Railroad Co.*, 10 Cush. 562; *Wakefield v. Railroad Co.*, 37 Vt. 330. In *Railroad Co. v. Singer*, 78 Penn. St. 219, the case was that the plaintiff was driving his horse parallel with defendant's tracks, and the horse was

frightened by the whistle. The court reversing said: "If the court below had left it to the jury to find negligence from the use of the whistle the second time, if they believed it to be so used, provided the engineer saw, or with proper care might have seen, the plaintiff's wagon, and that his horse was becoming unmanageable, there would have been no error." There were two blasts of the whistle in this case cited, and the court allowed the jury to say whether the first blast was negligent. In this case there was no question of the right to use the whistle at the point at which it was used. The question was whether it was used in a negligent manner. *Hill v. Railroad Co.*, 55 Maine, 438, is a case nearly in point with the case in hand. There a horse was standing at the depot, the train started, and the engine driver blew a sharp, loud blast, which frightened the horse. The defendant had legislative authority to blow the whistle there, but the question of whether there was negligence in the manner of blowing the whistle was left to the jury. In *Culp v. Railroad Co.*, 17 Kans. 475, the declaration charged that a negligent blowing of the whistle was the cause of the injury. On demurrer it was held actionable. To the same effect may be cited the case of *Railroad Co. v. Dunn*, 52 Ill. 451. While a railway company is entitled by law to run its train along a street it is not liable for damages caused by the horses of a traveler taking fright at the necessary blowing off of steam from one of its locomotives; but, if the steam was blown off negligently, it would be liable. *Hahn v. Railroad Co.*, 51 Cal. 605. Under our statute in this state, the court will judicially know that the blowing of a whistle is one of the signals used in running a railway train, and that it is authorized and required; yet, if it be done negligently or wantonly, such negligence or wantonness is actionable. 1 *Thomp. Neg.* 351, and cases cited; *Railway Co. v. Harmon*, 47 Ill. 298; *Railroad Co. v. Starnes*, 9 Heisk. 52. So, in case of the sounding of a steam whistle with a loud noise when it was unnecessary (*Ibid.*), where it was a negligent act (*Railroad Co. v. Dunn*, 52 Ill. 451), and where it was done in a spirit of wanton playfulness (*Railroad Co. v. Starnes*, 9 Heisk. 52); and, so far as the adjudicated cases go, the question whether the act was one of negligence or of wantonness or malice is of little import, save as to the measure of damage.

Reference has been made to these few cases on the subject of the care to be exercised in giving even the statutory signals, to show that this specific character of negligence has been a subject of adjudications. It, of course, cannot be at all denied that there may be such negligence, heedlessness or wantonness in the sounding of railway whistles, even at the places where it is authorized and required to sound them, as to be entirely actionable. While no liability attaches for damages for these acts so long as they are exercised in accordance with statutory authority with ordinary care, yet liability ensues when they are done negligently or wantonly. The rule obtains generally that a master is not answerable in damages for the wanton and malicious acts of his servant; yet this immunity is not generally extended to railroad corporations, whose servants are intrusted with such extensive means of doing mischief. Accordingly, it has been established that if such servants, while in charge of the company's engines and machinery, and engaged about its business, negligently, wantonly or willfully pervert such agencies, the company must respond in damages; and this is the principle deducible from the authorities upon this subject. Applying these principles to the facts and circumstances of this case, it leads to the conclusion that the jury should have been permitted to pass judgment upon the question whether this whistle was blown in such a negligent, willful or wanton manner as to be actionable.

Turning to the question of whether the plaintiff was guilty of contributory negligence in this case, it seems very difficult to determine upon what ground such contributory negligence can be imputed to him. Neither by his own act, nor any act of his uniting with the act of the engineer in blowing this whistle, can want of care be attributable to him. It would appear that he was then, so far as his own case goes, exercising every care which a prudent man could exercise. He was in a place, and on a way, where he had the legal right to be — in fact, at a place provided by the defendant for him to be in the business of unloading freight from its own cars; and he was on the very grounds prepared by the company for this use, and engaged in an occupation perfectly legal and proper, and one which was of advantage to the defendant. On learning of the approach of the train, although without hearing any statutory signal, he exercised care in placing himself

in a position in which he would be most conveniently able to control his horse in case the exercise of such control was needed, and he used every endeavor possible to so control it and avoid injury: and in the discussion of this question it is assumed that he was guilty of no act of negligence in endeavoring to control and save from injury the horse which he had in charge. And, while no opinion can perhaps be passed here as to the conclusion or inference to be drawn from these facts, yet for the purposes of this case it would appear as if the inference of ordinary care and caution to avoid injury is the most reasonable one, and at all events not so clearly otherwise as to deprive the jury of the right to pass on it. Upon this question of whether a nonsuit, upon either of these grounds here discussed, should have been granted, the rule of law to apply has often been enunciated in this court, and there is but little need of referring to more than one or two cases. It is by applying these general rules to each particular case that a safe conclusion can be reached. The chief justice, in *Railroad Co. v. Matthews*, 36 N. J. Law, 531 (in this court), speaking to the question whether the plaintiff, by his want of ordinary caution, produced the damage, says: "It is sufficient for all useful purposes to say that the evidence on this subject is open to fair debate, and leaves the mind in a state of some doubt on this question whether the driver of the horses which were destroyed exercised or not that degree of care which his legal duty exacted. This being the case, the judge would not have been justified in taking this question from the jury. Such a course is proper only when the absence of caution is apparent, and is in reason indisputable." This general doctrine has been universally adopted, and in *Bahr v. Lombard*, 53 N. J. Law, 233; 21 Atl. Rep. 190; 23 Atl. Rep. 167, Mr. Justice Garrison (in this court), as alike applicable to the defendant upon alleged proof of negligence and to the plaintiff upon alleged proof of contributory negligence, declares that "when, in an action for negligence, the standard of duty can be predicated as matter of law, the only question for the jury is whether the conduct of the defendant fell short of that standard. If, from the facts in evidence, two inferences as to the defendant's conduct may legitimately be drawn, one favorable and the other unfavorable to its negligence, a ques-

tion is presented which calls for opinion of the jury." Passing over the many decided cases adhering to this doctrine, the latest expression on this subject is by Mr. Justice Magie (in this court), in *Railway Co. v. Block*, (N. J. Err. & App.) 27 Atl. Rep. 1067, where, in speaking of the power to direct a nonsuit or verdict, he says: "The power to direct a verdict is identical with and rests upon the same foundation as the power to nonsuit." When in such cases the trial judge is requested to nonsuit or direct a verdict, his duty is, as is well expressed by Lord Chancellor Cairns in *Railway Co. v. Jackson*, 3 App. Cas. 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to the jury; but if, from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to find whether, from those facts, negligence ought to be inferred. In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred by the jury. It follows that, if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judges must submit them, and the inferences to be drawn from those which the jury find established to the determination of the jury. *Moebus v. Becker*, 46 N. J. Law, 41; *Railroad Co. v. Shelton*, (N. J. Err. & App.) 26 Atl. Rep. 937; *Crue v. Caldwell*, 52 N. J. Law, 215; 19 Atl. Rep. 188. Applying these principles to the case here upon review, the trial judge should have submitted the question of the defendant's negligence and the question of the plaintiff's contributory negligence, if it was alleged that any existed, to the jury. I shall, therefore, vote for a reversal of the judgment of nonsuit, and for a venire de novo. Magie and Van Syckel, JJ., dissent.*

Railroad companies — liability for damages resulting from the frightening of horses by blowing whistle, emitting steam, etc. In an action against a railroad company for injuries sustained by plaintiff's wife from the running away of horses attached to a four-horse wagon in which she was riding, there was evidence that plaintiff, who was driving his wife along a highway

* Reported in 28 Atl. Rep. 305.

towards the crossing of defendant's railroad, hearing the whistle of an approaching engine, left the wagon in her charge, and ran ahead to turn back from the railroad cattle which his sons were driving, having accomplished which he returned, and took hold of one of the horses. After reaching a point from which the horses could be readily seen, the engineer blew several loud and sharp whistles, before and after reaching the crossing, frightening the horses, and causing them to run away. Plaintiff testified that the horses became frightened at the first whistle, and that their fright could be seen by those in charge of the train. The fireman, who was on the tender, and some of the passengers saw their fright before the whistles were blown the second time, and the engineer did not testify as to whether he saw them or not. Held, that a verdict for plaintiff was warranted, on the ground that the engineer negligently and wantonly blew the whistle when it was unnecessary. *Gulf, C. & S. F. R. Co. v. Box*, 81 Tex. 670; 17 S. W. Rep. 375.

A railway company, in the legitimate transaction of its business, has the right to use steam, and is not liable for the proper and necessary use of the same, even if it result in injury to others, as by frightening horses and causing them to run away. If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine, and frightens such horses, and causes them to run away and commit injury, the company will be liable provided the plaintiff is free from contributory negligence. *Omaha & R. V. R. Co. v. Clarke*, 35 Neb. 867; 53 N. W. Rep. 970.

The complaint in an action against a railroad company for negligently blowing the whistle and allowing steam to escape from its engine, whereby plaintiff's horse was frightened, alleged that plaintiff was riding along a street which was parallel to defendant's track, near its intersection with another street; that the horse was gentle and plaintiff was not guilty of any negligence, but was using all diligence to manage his horse well and to avoid any accident; that defendant's servants, who were in charge of a locomotive engine on such track, well knowing that plaintiff was on the highway, "so carelessly ran and managed the said locomotive engine as to cause and suffer it, by the blowing of its whistle, the blowing off of its steam, and suffering its steam to escape from it, to make loud and unusual noises, and thus frighten the horse which the plaintiff was riding, and causing him to become unmanageable, and to thus throw this plaintiff," etc. Held, that the complaint stated facts sufficient to constitute a cause of action. Coffey, Ch. J., and Miller, J., dissenting. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82; 28 N. E. Rep. 351. The complaint further alleged "that the said defendant, by its agents and servants, well knowing that the plaintiff was passing along said street and highway, and not regarding its duty in that respect, but intending to injure the plaintiff, and to do that which would result in his injury, so purposely, willfully and recklessly ran and managed its locomotive engine which was upon said switch and side track, as to cause it, by the blowing of its whistle and the blowing off of its steam, to make loud and unusual noises, and thus to frighten the horse," etc. Held, that such allegation sufficiently charged a willful injury. *Ibid.*

The Revised Statutes of Wisconsin, section 1809, provide that an engine,

before crossing any highway, except in cities and villages, shall have its whistle blown eighty rods from such crossing. Held, that where, in an unincorporated village, an engine whistled at the whistling post for one street, and continued to whistle till it arrived at another whistling post 400 feet away, this was not negligence on account of which one who was injured by his horse becoming frightened at the noise could recover from the railroad company. *Cahoon v. Chicago & N. W. R. Co.*, 85 Wis. 570; 55 N. W. Rep. 900. Neither was it negligence to allow steam to escape with considerable noise from the cylinder cocks. *Ibid.*

A freight train was obstructing a highway in violation of statute, and detaining plaintiff and his team, when a passenger train came along, emitting smoke and steam, the origin of which was obscured by the freight train. Plaintiff's horses, which were gentle and used to trains, were frightened by the smoke and steam, and ran away, injuring plaintiff. Held, that the question whether or not the obstruction of the road by the freight train was the proximate cause of the injury was properly submitted to the jury. 24 N. W. Rep. 774; 58 Mich. 195, distinguished. *Selleck v. Lake Shore & M. S. R. Co.*, 98 Mich. 375; 53 N. W. Rep. 556.

BLISS V. NEW YORK CENT. & H. R. R. R. Co.

(Supreme Judicial Court of Massachusetts, January 20, 1894.)

1. RAILROAD COMPANIES. RELEASE OF DAMAGES FOR PERSONAL INJURIES. EVIDENCE. Plaintiff having testified that when he signed a release to defendant railroad, a little while after an accident, he was dazed, and defendant having produced evidence in rebuttal, the court might allow an expert to testify, assuming plaintiff to have suffered such a nervous shock as was described, what would be its probable "or possible" immediate effect on his body and mind.

2. FRAUD IN PROCURING RELEASE. PROOFS. Plaintiff's proof went to show that in a train accident he had received a shock which later resulted in serious injury; that his face bore marks of the direct injury; that an hour and a half after the accident, while he was in the superintendent's office, still "dazed and rattled," defendant's agent prepared two papers for his signature—a release, which he told him was merely a form, and a receipt, which he said was for the damages to plaintiff's clothes—the release being in fact comprehensive, and the receipt including, "also, injury to person;" that plaintiff signed the papers without reading them, or knowing their contents. The agent testified that nothing was claimed or allowed for personal injuries. Held, that the jury was justified in disregarding the papers as relating to personal injuries.

3. EFFECT OF VALID RELEASE OF INJURY TO CLOTHING UPON RIGHT TO RECOVER FOR PERSONAL INJURIES BY SAME ACCIDENT. Where a sufferer by a train accident sues for damages for his personal injuries, and his release and receipt for claims for injuries to his clothing and person are found, as to the

latter, to have been obtained by fraud and without consideration, though he could not have sued separately for the two injuries, it is no objection to his recovery that he has not returned the money paid him in settlement for his clothes.

ACTION by Elmer J. Bliss against the New York Central and Hudson River Railroad Company for damages for personal injuries. Verdict for plaintiff. Defendant excepts.

At the trial the plaintiff introduced evidence tending to prove that at the time of the accident he was a traveling salesman in the employ of a firm in Boston; that on September 8, 1890, in the pursuit of his business, he left Troy for Albany upon a train of the defendant which started from Troy about half-past seven o'clock in the morning; that, when a short distance outside of the railroad station in Troy, the car in which the plaintiff was riding was derailed, and thrown against the wall of the tunnel through which it was then passing; that the plaintiff was thrown partly through a window of said car, and received the injuries complained of; that about an hour and a half after the accident he went to the office of the superintendent of the defendant at Albany. In direct examination the plaintiff testified: "When I was conducted into the superintendent's office, a gentleman sitting at the desk inquired the cost of my trousers and hat, and I replied, 'Twelve dollars for the trousers, and five dollars for the hat.' He told me to take a seat, and produced two papers. He passed me one, saying, 'This is merely a form,' and the second he said was a receipt for the trousers and hat. I signed them and proceeded. I did not read the papers. They were not read to me. I was rattled — dazed — at the time. I first knew of these papers when the trial commenced, yesterday. I first knew the contents of these papers in detail when I read them this morning." In cross-examination the plaintiff testified: "The first thing that was said by any one to me when I went into the superintendent's office was that the man at the desk inquired the cost of my trousers and hat. I cannot give his language. He did not ask whether I had been injured. I think he did not ask whether I had been in any accident. There was nothing the matter with my eyes at that time so far as I know. There was nothing the matter with my eyes to prevent me from seeing what was written on the papers, except that I was dazed. I was rattled. This did

not prevent me from writing down an order for goods at noon on that day. After he asked me the cost of my trousers and hat he presented the papers at once. (Papers shown.) There is none of that my writing except the signature. That is my usual signature, as near as I could get it then. I had a difficulty in signing on account of the bandage on my arm. I saw him sit down and prepare the papers. I saw him write them and then hand them to me. That is all that was said between us from the time I went in until he wrote these papers out. He inquired my name. I did not tell him on what train I had been injured, or that I had been in any accident. He inquired my place of business and I told him. I did not tell him anything about the scratches on myself. I did not say anything about scratches on my arm. The scratch on my face was evident to be seen. I can't say that I said anything about the difficulty I had in writing. I did not read either of the papers. I signed them without reading them. I first learned that I had signed two papers that were releases of my personal claims at the commencement of this trial yesterday. Mr. Williams, my counsel, told me it was probably a release. Mr. Williams has been my counsel from the beginning of the suit. I do not recollect which of the papers I signed first. I did not know that one was a printed form and the other was a written bill. I did not look at it. There was light where I signed it. I looked at it enough to put my signature in the proper place, if it was not pointed out to me. I saw enough to select the proper place. I cannot say whether it was sealed." The plaintiff, being recalled after defendant's testimony was in, testified in direct examination: "When I entered the office of the superintendent, I did not open the conversation by stating that I was a passenger on the train that had been derailed. I did not show Mr. Bissell the cut over my eye, and tell him I had a cut on my arm. He did not state to me that I was settling in full. I did not tell him that my personal injuries amounted to nothing, and that I had no claim for them. When he presented the instrument to me he did not state that it covered everything from the beginning of the world, or released the road from all claims. I was not in his office for half an hour. I was there about fifteen minutes, at the most. I do not remember the conductor coming into the office while I was there. I do not

remember that I had any conversation with Mr. Finch. Mr. Bissell was the only gentleman I had any conversation with." In cross-examination he testified: "I testify that these statements were not made, because, if they were, I should have remembered them. I was in a dazed condition. I feel sure I should remember any of those things. It is on that ground that I am willing to testify that conversation did not take place between me and them." The defendant introduced the testimony of Charles M. Bissell and Mr. Finch, which tended to show that Charles M. Bissell, the division superintendent of the defendant, and his clerk, Charles C. Finch, were in the office when Mr. Bliss entered it; that they had been previously informed by telegram of the happening of the accident; that they had not seen Mr. Bliss before, nor did they know that he had been in the accident; that when Mr. Bliss entered the office he began the conversation with Mr. Bissell, telling him that he had been a passenger on the train which had been derailed, and that in the accident his hat had been broken and his trousers torn; that he showed a slight cut over the eye, and referred to his arm being scratched, and glass having got into his hair and scalp; that he stated that he came to the office to make a settlement for his damages; that Mr. Bissell sent for the conductor, who came and identified Mr. Bliss as having been in the accident; that Mr. Bissell asked Mr. Bliss the amount of his claim, and that Mr. Bliss said his trousers cost twelve dollars and his hat five dollars, and that he was willing to settle for seventeen dollars; that Mr. Bissell then asked him about his personal injuries, and that Mr. Bliss said that they did not amount to anything, and that he made no claim for them; that they had some further conversation about the cost of his trousers and hat, and his position in the car at the time of the accident. Mr. Bissell then said that if any settlement was made it would have to include everything — both the loss of his trousers and hat, and the personal injuries that he might have sustained; that Mr. Bliss said his personal injuries were of such a trifling character that he did not think he was entitled to any amount for them, and that he was willing to sign a release, releasing the company from all liability from any claim whatever that he might have, upon the payment of seventeen dollars; that Mr. Bissell inquired his name and address, and the

name of his firm, and then drew up the receipt and release referred to in the plaintiff's testimony, copies of which are annexed to these exceptions, marked "A" and "B;" that when the papers were drawn up a seal was placed upon the release, and Mr. Bissell explained to Mr. Bliss the contents of the papers, and stated that this was a settlement in full for his clothes and for personal injuries; that it was a settlement of all claims from the beginning of the world up to the present time; that he then handed the papers to Mr. Bliss, and told him they were for him to read and to sign; that Mr. Bliss took the papers, looked them over, and seemed to read them; that Mr. Bliss then signed the papers, and that Mr. Bissell and Mr. Finch witnessed them; that Mr. Bissell then paid Mr. Bliss the seventeen dollars; that neither Mr. Bliss nor Mr. Finch noticed that Mr. Bliss' arm was bandaged, or that he had any difficulty in signing the release and receipt; that Mr. Bissell did not say to him that one of the papers was a receipt for his trousers and hat, and the other a mere form; that neither Mr. Bissell nor Mr. Finch knew that Mr. Bliss had been to see a physician; that Mr. Bliss did not appear to be bewildered or dazed; that he seemed to know perfectly what he was doing; that there was nothing out of the ordinary in his conduct, or different from the conduct of ordinary people coming into the office; that Mr. Bliss, in his conversation with Mr. Bissell, gave accurate answers to the questions put to him; that he did not show the slightest sign of incoherency in his talk, and that he acted as a bright, energetic young man naturally would; that he was in the office from twenty minutes to half an hour. It was admitted that the plaintiff was paid by the defendant seventeen dollars upon his signing the release and receipt. There was evidence tending to show that the plaintiff was of sufficient mental capacity to understand and appreciate the contents of the receipt and release at the time that he was in the office of the superintendent.

Dr. George L. Walton, a physician, was called by the plaintiff, and his testimony tended to show that he was an expert. The plaintiff's counsel asked him the following question: "Now, assuming that the plaintiff had received this nervous shock which he has testified to, in the manner which he has testified, what would you say in regard to its effect upon his physical and men-

tal condition ; its probable or possible effect — immediate effect ? ” To this question the defendant objected. The court, Dr. Walton having heard the plaintiff testify, allowed the question, and the defendant excepted. The witness answered : “ The effects might vary more or less. I could not say, in a given case, what would occur. It might have very little or no effect on a man, or might have the effect of temporarily startling him — anywhere from there to throwing him into an hysterical condition, throwing him into a condition of nervous prostration, and affecting his mind so that he would be quite irresponsible, and do all sorts of foolish things ; might vary anywhere between these two things.” It was admitted that, several months before the trial, true copies of the receipt and release signed by the plaintiff were shown to the plaintiff’s counsel, and were thoroughly examined by him. On the second day of the trial the plaintiff’s counsel tendered to Samuel Hoar, who was trying the case as counsel for the defendant, twenty dollars in gold, which was not accepted by the defendant’s counsel ; he stating that he was not agent of the defendant for any such purpose. Before the arguments the plaintiff’s counsel stated to the jury that they might deduct the said seventeen dollars and interest from any sum they might find for the plaintiff.

The defendant requested the court to instruct the jury as follows : “ (1) If, at the time that the plaintiff signed the release and receipt, he was of sufficient mental capacity to understand and appreciate them, if he read them, and if he had capacity to read and write at that time, he cannot recover in this action. (2) As the plaintiff has kept the money paid him upon his signing the receipt and release until the present time, he cannot now recover in this action.” These requests for instruction the court refused to give, and the defendant excepted. The court ruled and instructed the jury that the tender of the twenty dollars in gold, made to the defendant’s counsel, was a proper and sufficient tender of the money paid by the defendant to the plaintiff, to which ruling the defendant excepted. The court ruled that if, at the time that the plaintiff signed the release and receipt, he was of sufficient mental capacity to understand and appreciate them, if he read them, and if he had capacity to read and write at that

time, he could not recover in this action, unless he was prevented from reading them, or induced not to read them, by the fraud of the defendant or its agent Bissell. To this instruction the defendant excepted.

A. Hemenway and T. H. Williams, for plaintiff. Samuel Hoar, for defendant.

ALLEN, J. 1. The objection to the question to Dr. Walton is placed on the ground that the question ought to have been limited to the probable effect of the injury upon the plaintiff, and that the question which was allowed to be put went too far, in asking as to its possible effect. As bearing upon the alleged fraud of the defendant's agent in procuring the release and receipt, it is obvious that the mental condition of the plaintiff was important to be considered. If his mind was clear and strong, he was more likely to understand what he was doing, and less likely to be imposed upon. He had himself testified that he was "rattled — dazed" — at the time. A witness for the defendant had testified that the plaintiff did not appear to be so, and there was other evidence in defense tending in the same way. There being this conflict of evidence as to his actual condition, it was certainly competent for the court, in its discretion, to admit the testimony of an expert that his mind might be dazed or confused as the result of such an accident as he had described, even though the testimony did not go so far as to show that this result was probable.

2. The defendant contends that there was no sufficient evidence to be submitted to the jury of fraud on the part of its agent in procuring the release and receipt. The evidence in favor of the plaintiff on this point was, in substance, that in the accident he had received a shock which had finally resulted in serious damage to him; that he bore marks of the direct injury upon his face; that while he was in this condition, about an hour and a half after the accident, in the office of the defendant's superintendent, the defendant's agent prepared the two papers for him to sign, and passed the release to him, saying, "This is merely a form," and said the second paper was merely a receipt for the trousers and hat; that both of these statements were

false ; and that he signed both papers without reading them, or knowing their contents. The witnesses for the defense gave a full account of what took place at this interview, with particulars which the plaintiff denied to be true, or denied having any remembrance of. The defendant's agent testified that nothing was allowed by way of payment for personal injuries, and that no claim was made for such injuries. Upon this evidence, it might be argued in behalf of the plaintiff that he supposed he was receiving payment merely for the injuries to his clothing, but did not understand that he was cutting himself off from a claim for personal injuries ; that, if he was in fact rattled or dazed in mind, the defendant's agent would probably have observed it ; and that the insertion of the words, "also injury to person," in the receipt for the damages to his clothing, and the taking of the release of all claims whatever in consideration of the payment of seventeen dollars, and in view of the declarations of the defendant's agent to the plaintiff, tended to show fraud. The weight of argument and evidence was for the jury. All that we need say is that the conclusion of the jury was warranted. *Freedley v. French*, 154 Mass. 339 ; 28 N. E. Rep. 272 ; *Peaslee v. Peaslee*, 147 Mass. 171, 180 ; 17 N. E. Rep. 506 ; *O'Donnell v. Clinton*, 145 Mass. 461 ; 14 N. E. Rep. 747 ; *Trambly v. Ricard*, 130 Mass. 259.

3. The defendant further contends that the plaintiff cannot maintain this action, because, before bringing it, he failed to restore to the defendant the money which the defendant had paid to him for the damage to his hat and trousers. It is plain that the plaintiff's release and receipt do not of themselves stand in the way of his maintaining the action, because, so far as they relate to his personal injury, they must now be assumed to have been obtained from him by fraud. *Rosenberg v. Doe*, 148 Mass. 560 ; 20 N. E. Rep. 176 ; *Id.*, 146 Mass. 191 ; 15 N. E. Rep. 510 ; *O'Donnell v. Clinton*, 145 Mass. 461 ; 14 N. E. Rep. 747 ; *Squires v. Amherst*, 145 Mass. 192 ; 13 N. E. Rep. 609 ; *Mullen v. Railroad Co.*, 127 Mass. 86 ; *Smith v. Holyoke*, 112 Mass. 517. The release and receipt are to be read as if they did not purport to discharge any claim he might have for personal injury, and by reason of the fraud the case is free from any question of the admissibility of parol evidence to vary or control the writing. But the objection

is that the retention of the money precludes him. It is true, under our decisions, that the injury to the plaintiff's person and to his clothing furnished but one cause of action, and that a recovery of judgment by him for the injury to his clothing would have barred a subsequent action for his personal injury. *Doran v. Cohen*, 147 Mass. 342; 17 N. E. Rep. 647; *Knowlton v. Railroad Co.*, 147 Mass. 606; 18 N. E. Rep. 580; *Sullivan v. Baxter*, 150 Mass. 261; 22 N. E. Rep. 895; *McCaffrey v. Carter*, 125 Mass. 330; *Folsom v. Clemence*, 119 Mass. 473; *Goodrich v. Yale*, 8 Allen, 454; *Trask v. Railroad Co.*, 2 Allen, 331; *Bennett v. Hood*, 1 Allen, 47. In this respect the law, as established here, differs from that of England, upon which the plaintiff relied in argument. *Brunsdon v. Humphrey*, 14 Q. B. Div. 141; *Colliery Co. v. Mitchell*, 11 App. Cas. 127, 144, per Lord Bramwell; *McDougall v. Knight*, 25 Q. B. Div. 1, 8. In the present case, however, the plaintiff recovered no judgment, and has brought no prior action for the injury to his clothing; and the question which we have to determine is whether, before bringing this action, he was bound to return the seventeen dollars received for the injury to his clothing, and whether the action is defeated by the omission so to return it. The defendant contends that accepting payment for a part of the injury which he sustained, and retaining the money, debar the plaintiff from maintaining an action for the other part of the injury, just as the recovery of a judgment for one part of the injury would debar him. But there are good reasons for holding the contrary doctrine. If one sues to recover for an injury, he may well be held to include in his action all that he is entitled to sue for, in respect to that cause of action. But if one is making a settlement, the same reasons do not apply, and if he cannot make a full settlement he may make a partial one, and thus eliminate one element out of the controversy. If, for example, there is an insurance on real and personal property, and a fire occurs, destroying all of the property insured, or if a fire set by sparks from a locomotive engine, or other wrongful act, spreads and causes damage to real and personal property, or to different buildings of the same owner, the parties, undoubtedly, may settle the claim as to one piece of property, leaving it open as to the others; and in such case a payment for so much as has been agreed on certainly would not debar the owner from recovering what he is entitled

to in respect to the rest. Now, if such was the oral agreement of settlement as to a part of the loss, but the owner was, by fraud, led to sign a receipt for his whole claim, and if he afterwards sues for that part of his loss which he has not been paid for, and is able to set aside and avoid the terms of his receipt by reason of the fraud, there is no good reason why the payment for his loss upon one piece of his property should debar him from recovering for the loss upon the rest, even though he retains the money so paid to him. Why should he pay it back, when it represents only the sum agreed on for his compensation for that portion of his loss which he no longer seeks to recover for? So here. The plaintiff must now be deemed to have received the seventeen dollars for the injury to his clothing alone. This much was adjusted between the parties, and paid for. The plaintiff, although he included a claim for damage to clothing in his declaration, does not now seek to recover for that loss, or to avoid the settlement which he says he actually made with the defendant's agent. On the other hand, he stands to and affirms all that was included in the settlement actually made. If it was understood at the time that the payment was received only for the injury to his clothing, and that no claim for personal injury was settled for or released, and if the release and receipt were by fraud so phrased as to cover that claim also, and if they are avoidable by reason of the fraud, so far as the claim for personal injury is concerned, the plaintiff was under no obligation to return the money received by him for the injury to his clothing before bringing his action for the personal injury. *Muller v. Railroad Co.*, 127 Mass. 86; *Smith v. Holyoke*, 112 Mass. 517; *Bartlett v. Drake*, 100 Mass. 174; *Walker v. Swasey*, 2 Allen, 312; *Roberts v. Railway Co.*, 1 Fost. & F. 460, cited with approval in *Lee v. Railway Co.*, L. R., 6 Ch. 527, 537. Exceptions overruled.*

1. Railroad companies—release of claim for personal injuries—what amounts to fraud in procuring.—The plaintiff below, while an employee of the defendant railway company, having sustained a personal injury by reason of its negligence, and having thereafter released his right of action for such injury by a contract of accord and satisfaction fully executed, cannot maintain an action against the company for inducing him to enter into

* Reported in 36 N. E. Rep. 65.

that contract, and accept satisfaction under it by fraudulently persuading him through its superintendent and its employed physician, to believe that his injury was not a material one, and would not be permanent, it not being alleged that any artifice, trick or contrivance was used to prevent him from ascertaining the true nature of his injury, and its probable duration, these matters lying as much within his knowledge, or means of knowledge, as within the knowledge of the defendant, its officers, agents and employees. *Hayes v. East Tenn., Va. & Ga. R. Co.*, 89 Ga. 264; 15 S. E. Rep. 361.

2. Release to railroad company in consideration of payment by railroad relief association—impeachment for fraud.—In an action by an employee against a railroad company for personal injuries, it appeared that plaintiff was a member of a relief association limited to the employees of defendant company; that plaintiff received from the association the amount of money to which he was entitled, and, under the rules of the association, he executed to defendant releases from all claim for damages on account of such injury. Held, that a replication which sought to avoid the releases, not on the ground of fraud in procuring them, but because of the alleged partial failure of some of the inducements which led plaintiff to become a member of the association, was demurrable. *Spitze v. Baltimore & O. R. Co.*, 75 Md. 162; 23 Atl. Rep. 307. In such action there was evidence to show that the releases were not read to plaintiff, that he could not read English, and that he believed he was signing receipts of the association; but plaintiff did not request the papers read, nor ask what they were, nor mention that he could not read English, but signed them without knowing their contents. Held, that there was no evidence to show that the releases were obtained by fraud. *Ibid.*

3. General words of release limited to injuries specified.—A release for settlement of claim for certain personal injuries specified in the release, and also "of and from all manner of actions, causes of action, claims and demands whatsoever, from the beginning of the world to this day," does not cover personal injuries not therein specified, and not known to exist at the time the release is executed, since the general terms in the release are limited by the preceding specifications. *Union Pac. R. Co. v. Artist*, (Ct. of App.) 60 Fed. Rep. 365.

4. Necessity of tendering back money received on a fraudulent release.—One may sue for personal injuries without tendering a return of money received for a release of his claim, which he contends was obtained by fraud, and while he was mentally incapacitated, it being sufficient that the court instructs that, if the jury find for plaintiff, they deduct from the amount awarded the sum already received. *O'Brien v. Chicago, M. & St. P. R. Co.*, (Iowa) 57 N. W. Rep. 425. Upon this point the court says: "We come now to a consideration of what we regard as the material question in the case. It is conceded that the defendant paid to the plaintiff the sum of \$210.50 in money, and settled a bill for his boarding, amounting to \$39.50; and it is claimed by the defendant that, even if the settlement was voidable by reason of the fraud, or void because the plaintiff did not, at the time it was made, have sufficient mental capacity to make a contract, yet this action cannot be maintained, because it was brought without tendering to the

defendant the \$250 received at the time of the settlement. It is true that no tender was made. The plaintiff commenced this action on May 14, 1891, nearly two months after he was advised by Goodnow that it would be a waste of time to go to Marion to get work. The court instructed the jury that if they found for the plaintiff they should deduct from the amount awarded to him the sum of \$250, which he had already received. The verdict returned was in the sum of \$3,750. It is undoubtedly true that the general rule is that, whenever one has a right to rescind a contract, and exercises that right, he must restore the other party to the same condition he would have been in if the contract had not been made. The defendant claims that this release of a claim for damages comes within this rule. And it is not to be denied that there are adjudged cases which so hold. See *Brown v. Insurance Co.*, 117 Mass. 479. A number of other cases are cited by counsel, prominent among which is *Railway Co. v. Hayes*, (Ga.) 10 S. E. Rep. 350. We have given these cases a careful examination, and our conclusion is that they are not applicable to a state of facts such as is found in this case, and that there is another line of cases which, to our minds, announce the better rule. The case of *Hendrickson v. Hendrickson*, 51 Iowa, 68; 50 N. W. Rep. 287, is precisely in point. It is there held that, where a party had fraudulently procured the execution of a contract, he is not entitled to an offer to restore what he has received as a condition precedent to rescission. It is claimed by counsel for appellant that this case is overruled by the later case of *Bank v. Barnes*, 70 Iowa, 412; 30 N. W. Rep. 857. It is true there is language in the opinion in the last-named case which is not entirely in accord with the former case. But the court expressly said that it was unnecessary to determine this question. The cases of *Gullihier v. Railroad Co.*, 59 Iowa, 416; 13 N. W. Rep. 429, and *Wallace v. Railway Co.*, 67 Iowa, 547; 25 N. W. Rep. 772, were much like the case at bar. They were actions to recover for personal injuries, and settlements and releases were set up in defense. The question is not made in said cases that it was necessary to return or tender the amount received in settlement before commencing an action. It is true the question was not directly made in the pleadings in those cases, but the right to maintain the actions was not questioned by court or counsel. That the general rule above announced has no application to an action like this, see *Railway Co. v. Lewis*, 109 Ill. 120. It is there held, that 'if a release of a cause of action is obtained from a person by fraud and circumvention at a time when he is incapable of making a contract rationally, and money is paid him at the time of its execution, he may repudiate the release, and bring his action without first paying or tendering back the money received by him.' And in *Mullen v. Railroad Co.*, 127 Mass. 86, it was held, if a defendant obtains the signature of the plaintiff to a paper purporting to be a settlement and discharge of the cause of action, by fraudulent representations, it is merely a receipt for a gratuity, and the plaintiff may maintain his action without returning the money paid him. See, also, *Railroad Co. v. Doyle*, 18 Kans. 58; *Allerton v. Allerton*, 50 N. Y. 670; *Kley v. Healy*, (N. Y. App.) 28 N. E. Rep. 593. The last two cases are to the effect that the rule that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a situation as he was at the time the agreement was made is satisfied if the

judgment asked for will accomplish that result, and in such case no offer to return that which was received is necessary. In the case of *Kley v. Healy* the court uses the following language: 'A more satisfactory answer, however, may be found in the principle that one who attempts to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain, either by virtue of the contract sought to be set aside, or of the original liability.' This principle commends itself as eminently just. Applying it to the facts in the case at bar, we may well inquire, why should the plaintiff tender to the defendant that which the plaintiff was entitled to retain even if defeated in the action? In that event he would retain the \$250 by virtue of what the defendant contends is a valid transaction. When the court directed the jury that, if the plaintiff was entitled to recover, the sum paid at the alleged settlement should be deducted from the verdict, it was, in effect, a return of the money paid for the release." See, also, on the subject of releases and ratification, *International v. G. R. R. Co.*, 78 Tex. 314; 14 S. W. Rep. 609.

GIBSON v. CITY OF HUNTINGTON.

(Supreme Court of Appeals of West Virginia, November 11, 1898.)

1. MUNICIPAL CORPORATIONS. LIABILITY FOR FALLING EMBANKMENT. Where a city negligently permits an embankment on the side of a street to exist in a dangerous condition, it will be liable to one injured by its fall.

2. LIABILITY TO CHILD PLAYING IN STREET. A child may lawfully play in a public street, and, if injured by a defect in the street due to the negligence of the city, the latter will be liable.

3. NOTICE OF DEFECT. Where the defect is not due to the direct act of the city, it is essential to liability that it should have had notice of the defect or that it should have existed such a length of time that ignorance thereof would be negligence.

4. PRACTICE. SETTING ASIDE VERDICT WHEN JURY VIEW THE PREMISES. Where the jury view the premises the verdict cannot be set aside by the Supreme Court as contrary to the evidence, since what the jury learned by the view is not preserved in the record, and all the evidence is not before the court.

ACTION by Eustace Gibson, administratrix of the estate of Mary Lewis, deceased, against the city of Huntington, to recover for the death of decedent. Defendant had judgment, and a new trial was denied.

Gibson, Hutchinson & Gibson, for plaintiff in error. *Campbell & Holt*, for defendant in error.

DENT, J. Mary Lewis, an infant four years and five months old, while playing on the side of a road in the city of Huntington on the day of May, 1892, was killed by the falling of an embankment which had been left along the street or road as a barrier to keep travelers along the highway from driving into the adjacent creek. This embankment had been undermined to some extent by persons digging out sand and gravel, and was in a dangerous condition, as the death of the child bears witness. The street commissioner, after some excavating had been done (how much, the evidence does not disclose), put up a notice forbidding the taking of sand and gravel from this place; but afterwards (how long does not appear, nor how long before the accident) a man by the name of Brown excavated sand and gravel, and hauled it away; for what purpose is not revealed, but so far as the evidence shows, it was without the knowledge of the municipal authorities. The jury were taken to view the place of the accident.

It is now firmly established, by a long line of well-considered decisions, that a municipal corporation is liable for injuries occasioned by its negligence in the following three classes of cases: (1) Failure to keep its streets, alleys, sidewalks, roads and bridges in repair, under the statute. (2) In the discharge of ministerial or specified duties, not discretionary or governmental, assumed in consideration of the privileges conferred by charter, even though there be the absence of special rewards or advantages. (3) As a private owner of property, to the same extent as individuals are liable. It would be impracticable to cite all the authorities settling these propositions, but the following are referred to as leading cases: *Mendel v. City of Wheeling*, 28 W. Va. 233; *City of Richmond v. Long's Admrs.*, 17 Grat. 375; *Orme v. City of Richmond*, 79 Va. 86; *Mackey v. City of Vicksburg*, 64 Miss. 777; 2 South. Rep. 178; *Barnes v. District of Columbia*, 91 U. S. 540. In the first class of cases, negligence is presumed, and notice of defect is not required. In the second and third classes, negligence must be alleged and fully proven. *Chapman v. Milton*, 31 W. Va. 385; 7 S. E. Rep. 22; *Biggs v. Huntington*, 32 W. Va. 55; 9 S. E. Rep. 51.

This suit is not proper under the first class, or statutory pro-

vision, because it was not caused by any defect or obstruction in the roadbed; but it can be maintained under the two latter classes, because it is made the ministerial duty of the municipality, by law, to protect the public and individuals from anything dangerous, and the embankment that caused the injury was maintained by the city as its property, in lieu of other barrier along and within the boundaries of a public highway. The city has no more right to erect or keep within or along a public highway an unnecessarily dangerous structure, even though it be for some public purpose, than an individual. It is true that the city did not erect this embankment, but, as the witness said, it was placed there by nature, and the city adopted and maintained it as a barrier to prevent travelers from driving into the creek. Had there been an artificial structure so rudely constructed of stone, wood or iron as to fall of its own weight, and crush this child, the liability of the city would not have been questioned; and it certainly ought to make no difference whether the city builds or adopts one already there, even though nature was the original builder. It was its ministerial duty, neither governmental nor discretionary, to see that it was not dangerous to any one lawfully using the road, or any part thereof. By leaving the embankment there as such barrier, the council fixed the limits of the road, and any one using it had the right to lawfully use it, up to the limit so fixed, whether it was the traveled part of the road or not.

Was the child using the road for a lawful purpose? Children are not responsible for the choice of their parents, nor the place or condition of their birth. God decides these for them when He breathes into them the breath of life. Poor parents are unable to provide a place of healthful exercise and play for their children, but it requires all their earnings to clothe, feed and shelter them. The law prohibits them, under the penalty of being trespassers, from entering on the lands of others; and now to forbid them to use the road to its utmost boundary for the purpose of play, when not interfering in any manner with the traveling public, would savor too much of the dark ages of barbarism, when children were subjected to inhuman and diabolical punishments, and their lives were at the mercy of those having charge over them. It is the only commons they now have, and to confine them in the narrow limits of their cheerless tenement houses would be cruel,

unjust and oppressive, blight their young lives, and render their bodies weak, sickly, scrofulous and vile; and, if they could manage to escape the long list of contagious diseases so fatal to their kind, they would grow up to adult age morbidly despising laws so tyrannous and unworthy a civilized and liberty loving people. It is a right they have immemorially enjoyed, and should continue so to do as long as the public fails to provide them other free commons, where they can have the pure air, bright sunshine and sportive exercise so necessary to the healthful growth of their sensitive bodies. Horses, cattle, hogs, dogs and other domestic animals are all at large in the streets, unless prohibited by special ordinance, and why not children? The public highways can be put to no better use. So I am clearly of the opinion the child had the right to be there, even though out of the beaten path, and only for play. Neither was it old enough to realize the danger it was in, or the dangerous condition of the embankment, and could not possibly be guilty of contributory negligence.

The most troublesome question is that of negligence. In all cases where the remedy is not given by statute, but the common law, negligence must be proved by the party alleging it. Where the facts are indisputable, and there can be no fair difference of opinion as to whether the inference of negligence should be drawn, the question becomes one of law alone, and the court may decide it, if appealed to for this purpose. But, even where the facts are not disputed, if there may be a fair difference of opinion as to whether the inference of negligence should be drawn, or as to whether the facts sustain the charge of negligence, the jury are the sole judges, and their verdict cannot be disturbed, although the court may be of the opinion that the facts do not sustain it. The litigants have the constitutional right to a trial by a jury of fair and impartial men under the rules of law. Having demanded and had it, they have no right to complain, and the court has no right to interfere. It is a tribunal of their own choosing. It has been held in cases of this character, "that notice to the corporate authorities, either express or implied, must be shown. If the defect causing the injury had existed for such length of time that proper diligence would have discovered it, then no notice need be proven; but if

the defect arise otherwise than from faulty structure, or the direct act of said authorities or other agents, and be a recent defect, it is generally necessary to show that the town authorities had knowledge thereof a sufficient time before the injury to have, by reasonable diligence, repaired it, or that they were negligently ignorant of it." *Curry v. Town of Mannington*, 23 W. Va. 14. The embankment was on the side of the road, in a remote part of the city. The authorities had the right to leave it there as a barrier, provided it was not dangerous to the lawful users of the road. There is no evidence tending to show that it was dangerous when left there, but the evidence shows it afterwards became dangerous by reason of the excavations made under it. The street commissioner, when he found that persons were removing the sand and gravel, posted a notice warning them from so doing, not because he regarded it dangerous, but to prevent it from being destroyed as a barrier—the city's property. After this notice was put up (how long the evidence does not disclose, nor how long before the accident, except as a mere conjecture) a man by the name of Brown, without the knowledge or permission of the authorities, and against the express notice posted as aforesaid, did further excavating of sand and gravel, and hauled it away, which, presumably, was the excavating that rendered the bank dangerous. It is not shown that the authorities had notice of this last excavating. On the contrary, it appears from the evidence that they had no notice of it. The witness Brown, for some unexplained reason, is not introduced to show when or by what authority he did the excavating. It is true the street commissioner says he passed along there frequently, but it does not appear that he passed there after Brown had done his work, nor does it appear that there was anything to indicate to him that the embankment was in danger of falling; and none of the plaintiff's witnesses testify that they had any knowledge beforehand of the dangerous character of the embankment that produced the injury, and one of his principal witnesses says: "I considered it dangerous from falling on top. I didn't know it would cave down on them." From this evidence the jury certainly had a right to conclude that the structure was not rendered dangerous by the direct act of the city authorities; that they had no notice of its dangerous character a sufficient time before the injury to have, by reasonable dili-

gence, repaired it; and that they were not negligently ignorant of it. While we might have found a different one, we have no right to disturb their verdict. Their decision is supreme and final. But, even if this did not conclude us, there is another question that would; and that is that the jury were taken to view the spot and its surroundings. The counsel deemed it necessary. What effect this had on the minds of the jury in reaching a conclusion this court cannot say, but that it was material cannot be doubted. The remoteness of the place, the situation and character of its surroundings, and the nature and condition of the embankment, would obviously all be taken into consideration in making up a verdict. None of these things are before this court; and the settled rule is that this court will not disturb the finding of a jury unless all the material evidence touching the matter at issue that was considered by the jury is before it, as the case, as presented to the two tribunals, would be materially different.

No instructions were asked, and no points of law raised; and, there having been a fair hearing before an impartial jury, this court is legally powerless to interfere, and the judgment of the Circuit Court must be affirmed.*

Municipal corporations — liability for injury to child while playing in street by reason of defect therein.— In *Reed v. City of Madison*, (Wis.) 7 Am. R. R. & Corp. Rep. 127, it was held to be no bar to a recovery for an injury by reason of a defective sidewalk that the plaintiff, a child of seven years, was, at the time of the accident, using the sidewalk for travel and play combined. In *McGuire v. Spence*, 91 N. Y. 303, the plaintiff, a girl of fourteen, was injured by falling into an open area while playing jump the rope on the sidewalk. In affirming a judgment for plaintiff the court says: "Nor does it change the result that she was playing upon the sidewalk instead of using it for the ordinary purposes of travel. Our attention is called to certain cases in other states as authority for the doctrine that only those using the streets for their appropriate and normal purposes are within the rule of protection. *Blodgett v. City of Boston*, 8 Allen, 237; *Steinson v. Gardiner*, 42 Maine, 248; *McCarthy v. City of Portland*, 67 Maine, 167; 24 Am. Rep. 23. In these cases the actions were against municipal corporations under statutes which bound them to keep the streets safe and convenient for travelers, and a just construction of the written law furnished the limitation of the corporate duty. In this state we have held that the duty exists not merely as to travelers, but as to all persons lawfully in the streets, and have imposed upon a city a liability for negligence where the person injured was in no sense a traveler, but engaged in excavating the street under lawful permission, but for the benefit

* Reported in 18 S. E. Rep. 447.

of a private corporation. *Rehberg v. The Mayor*, 91 N. Y. 23. This plaintiff was lawfully in the street. She had a right to be there, and while there, not to be exposed to the possible dangers of an uncovered opening in the sidewalk. Nor does it matter that she was at play with other children. In *McGarry v. Loomis*, 63 N. Y. 108; 20 Am. Rep. 510, we stated it as a proposition too plain for comment that 'it is not unlawful, wrong or negligent for children on the sidewalk to play.'" See 2 Dill. Mun. Corp. § 1000, note 1, p. 1253; *Tighe v. Lowell*, 119 Mass. 472; *Hunt v. Salem*, 121 Mass. 294; *Gulline v. Lowell*, 144 Mass. 495; 11 N. E. Rep. 723; *Bliss v. South Hadley*, 145 Mass. 91; 13 N. E. Rep. 352; *Graham v. City of Boston*, 156 Mass. 75; 30 N. E. Rep. 170.

GUCKERT V. HACKE ET AL.

(Supreme Court of Pennsylvania, December 30, 1893.)

1. CORPORATIONS. VALIDITY OF ORGANIZATION. FAILURE TO RECORD CERTIFICATE. Under act of April 29, 1874, requiring original certificates of incorporation, with all indorsements, to be recorded in the office of the recorder of the county where the chief operations are to be carried on, whereupon the subscribers, etc., shall be a corporation under the charter, subscribers who have received their charter, but failed to record their certificate, do not become legally incorporated, and are liable, as partners, for company debts.

2. ESTOPPEL TO DENY INCORPORATION. Plaintiff made a contract with defendants who were doing business under the name of Hughes & Gawthrop Company. He was ignorant of any claim or attempt on their part to be incorporated. Held, that the name did not necessarily indicate an incorporation, and that plaintiff was not estopped by his contract from treating the defendants as partners.

3. Acceptance of a note signed by the corporate name, from members of an alleged corporation, in payment for work done at their request, does not estop the creditor to deny the corporate existence, and sue them, as partners, for the price of the work.

ASSUMPSIT by Frank J. Guckert against Paul H. Hacke, C. C. Hughes, J. B. George and E. B. Gawthrop, partners doing business as the Hughes & Gawthrop Company, for material furnished and labor performed by the plaintiff for defendants, in fitting up their office. Judgment for plaintiff against E. B. Gawthrop.

Robb & Fitzsimmons, for appellant. *Robt. S. Frazer*, for appellees.

STERRETT, Ch. J. It is essential to the creation of a corporation under an enabling statute that all material provisions should be substantially followed; and, exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint-stock companies, it follows that those who transact business upon the strength of an organization which is materially defective are individually liable, as partners, to those with whom they have dealt. What provisions are material must be gathered from the relation of each to the purpose and scope of the act; and when, therefore, successive steps are prescribed for the creation of corporations, these must obviously be regarded as imperative. Enabling statutes, on the principle of "*expressio unius est exclusio alterius*," impliedly prohibit any other mode of doing the act which they authorize. They must be strictly construed. *Suth. St. Const.* § 454. Hence, it has been uniformly held that requirements in respect to filing charters are imperative. *Childs v. Smith*, 55 Barb. 45; *Smith v. Warden*, 86 Mo. 382; *Abbott v. Smelting Co.*, 4 Neb. 416; *Beach Corp.* § 162. It is plain, even from a cursory reading of the act of April 29, 1874 (P. L. 73), that recording of the certificate "in the office for the recording of deeds, in and for the county where the chief operations are to be carried on," was intended to be made one of the conditions precedent to corporate existence. That was the last of successive steps required to be taken, and the right to begin the transaction of corporate business was made to depend on the taking of that step. "From thenceforth," the act expressly declares, the subscribers, and their associates and successors, "shall be a corporation for the purposes and upon the terms named in the said charter." One of the purposes of the act being exemption from personal liability in the transaction of business, it is obviously material that the public should have notice, and notice by record was accordingly prescribed. Failure to record was failure to comply with one of the express conditions of incorporation, and consequently of exemption from liability. It may be conceded that, had plaintiff dealt with defendants as a corporation, he would have been estopped from claiming against them in any other capacity, even though they failed to record their charter. *Spahr v. Bank*, 94 Penn. St. 429. But it is not pretended that he had any knowledge of the existence of the

charter; and there was certainly nothing, either in the name under which they did business, or in their conduct, which should have put him upon inquiry. In these circumstances, he was amply justified in dealing with them as partners. It was through their default, not his, that they were so treated, and it would be manifest injustice that he should lose his admittedly honest claim.

In the absence of an express agreement, the acceptance of a note from the defendants, as a corporation, after plaintiff had performed his part of the contract, cannot operate by way of election or estoppel. The relation of the parties was fixed by their status when the original contract was made, and cannot be changed by gratuitous inference. The members of the alleged corporation were the defendants, and were not injured by the acceptance of the note. The principle which treats the acceptance of a note as additional security to, and not as satisfaction of, a mechanic's lien (*Jones v. Shawhan*, 4 Watts & S. 257), is, with even more justice, applicable here. It follows from what has been said that the instructions complained of are erroneous. Judgment reversed, and a venire facias de novo awarded.*

1. Corporations — action to forfeit charter — effect of making corporation a party.— In an action by the state to forfeit a corporation's charter for want of substantial compliance with the statutory requirements in its formation, the corporation is a necessary party defendant, and making it such is not an admission of its corporate character, so as to preclude the state from questioning its right to corporate existence. *People v. Stanford*, 18 Pac. Rep. 85; 19 Pac. Rep. 693; and 77 Cal. 360, distinguished. *People v. Montecito Water Co.*, 97 Cal. 276; 32 Pac. Rep. 236.

2. Failure to acknowledge certificate of incorporation is cause for forfeiture.— Civil Code of California, section 292, provides that articles of incorporation must be subscribed by five or more persons, and acknowledged by each. Held, in an action by the state to forfeit a charter, that a complaint showing that the articles of incorporation were signed by five persons, and acknowledged by four only, stated a cause of action. *People v. Montecito Water Co.*, 97 Cal. 276; 32 Pac. Rep. 236.

3. Proof of corporate existence in collateral proceeding.— Evidence of the passage of an act incorporating a company, and that certain persons are doing business under the corporate name, is insufficient to prove that the corporation has been organized under the act. *State v. Murphy*, 17 R. I. 698; 24 Atl. Rep. 473.

It is not competent to prove the organization of a business corporation under the Illinois laws by the testimony of the two persons claiming to have formed

* Reported in 28 Atl. Rep. 249.

it, to the effect that, being in St. Louis, they crossed to Illinois with a lawyer, there complied with the laws, and got a charter, it appearing that the Illinois law requires at least three incorporators, prescribes various steps requiring considerable time for their accomplishment, and makes the certificate of the secretary of state to the complete organization of a corporation the legal evidence of that fact. *Owen v. Shepard*, (Ct. of App.) 59 Fed. Rep. 746.

The burden is on defendants to prove the existence of a corporation, where, being sued individually, as doing business under a company name, they deny individual liability, and aver that the company was a corporation, and that the services were rendered to it. *Ibid.* The rule that the regularity of the organization of a corporation cannot be inquired into collaterally has no application where individuals sued for services deny personal liability, and set up the existence of a corporation, to which the services were rendered. *Ibid.*

4. Liability of directors of corporation not legally organized for debts contracted in its name.—Where a charter is duly acknowledged and filed in the office of the secretary of state, naming certain persons as the directors of a corporation for the first year, but no capital stock is ever subscribed or paid, and no other steps are taken to complete the organization, and there is an entire failure upon the part of the incorporators to comply with the provisions of the law for the government of corporations, the organization cannot be said to have such a corporate existence as would authorize its directors to enter into any kind of a contract, transact any business, or incur any liability in the name of the corporation; and where a liability or debt is incurred in the name of the corporation before the organization is completed, the persons assuming to act as directors are personally liable. *Walton v. Oliver*, 49 Kans. 107; 30 Pac. Rep. 172. In this case the plaintiff had furnished lumber and materials to the corporation and charged the same to it. A balance remaining unpaid, he brought suit against the corporation and recovered judgment therefor. The judgment being unpaid, he brought the suit in question against the directors of the corporation. A recovery was sustained. As to the doctrine of estoppel in such cases see 3 Am. R. R. & Corp. Rep. 671, note.

The case of *Owen v. Shepard*, (Ct. of App.) 59 Fed. Rep. 746, is similar to the foregoing Kansas case. The suit was against the defendants individually to recover for legal services rendered by the plaintiffs. The defendants had been doing business under the name of the Indian Trading Company, and the services sued for had been rendered in some legal proceedings conducted in that name. The defendants set up that the Indian Trading Company was a corporation, and that the services were rendered to it. The proof was wholly insufficient to show a corporation *de facto*, and no attempt appears to have been made to show or insist upon an estoppel. There is an intimation that the purpose of the defendants in using the name in question was fraudulent. A judgment for the plaintiffs was affirmed and the court says: "The defendants set up as an affirmative defense that the services sued for were performed, if at all, for a corporation named the Indian Trading Company, and not for the defendants as individuals or partners doing business under the style of the Indian Trading Company, as alleged by the plaintiffs. The defendants thus

set up as a defense to the action the existence of the alleged corporation. Upon this issue we have seen the burden of proof rested on the defendants. The plaintiffs are not attacking the validity of the corporation collaterally; they are challenging the defendants to prove their assertion that such a corporation ever had an existence. The company was not shown to be either a de facto or de jure corporation. The only semblance of a corporation was its name. But the name did not distinctly purport to be the name of a corporation. Individuals may carry on business under any name and style they may choose to adopt. The style of the firm need not, and often does not, express the name of any actual member of it. It need not contain any individual names at all. The name Indian Trading Company is equally appropriate for a partnership or for a corporation. By common usage the use of "company" is as applicable to partnerships and to unincorporated associations as to corporations. Poll. Partn. arts. 10, 11. The name, therefore, was no evidence that the company was a corporation. One cannot wink so hard as not to see that this so-called corporation was one of those elusive, evanescent, will-o'-the-wisp corporations existing only in name, and a fraud upon the laws of the state where it was attempted to be formed, and equally a fraud on the states or territories and their citizens in which it carried on its business. It is no uncommon thing nowadays for persons to do as these defendants did — seek to acquire corporate life and power by a mere pretense of compliance with the law of a state in which they do not reside, and do not intend to carry on any business, in order that they may escape all liability for the hazards of the business in which they are engaged, and enjoy the privilege of litigating in the United States courts. These privileges are obtainable under existing laws and decisions of the courts, but not by simply adopting a supposed corporate name, or by a mere feigned compliance with the laws of the state of which it is claimed the corporation is a citizen. *Montgomery v. Forbes*, 148 Mass. 249; 19 N. E. Rep. 342; *Hill v. Beach*, 12 N. J. Eq. 31; *Smith v. Machinery Co.*, 19 Fed. Rep. 826; *Gas Co. v. Dwight*, 29 N. J. Eq. 244, 248; *Booth v. Wonderly*, 36 N. J. Law, 250; *Spell. Priv. Corp.* p. 928, § 829, note 2; *Demarest v. Flack*, 128 N. Y. 205; 28 N. E. Rep. 645."

WESTERN UNION TEL. CO. v. WILSON.

(Supreme Court of Florida, November 8, 1893.)

1. TELEGRAPH COMPANIES. MEASURE OF DAMAGES FOR NEGLIGENCE IN THE SENDING OR DELIVERY OF A CIPHER DISPATCH. The following rule, formulated in *Hadley v. Baxendale*, 9 Exch. 341: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be either such as may fairly and substantially be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both

parties, at the time they made the contract, as the probable result of the breach of it"—held to be applicable to the contracts of telegraph companies for the transmission and delivery of telegraphic messages, and consequently, that, for its breach of a contract to transmit or deliver an unexplained cipher or otherwise unintelligible message, such company is liable only for nominal damages, or at most for the sum paid it for the transmission and delivery thereof. *Telegraph Co. v. Hyer*, 22 Fla. 637; 1 South. Rep. 129, overruled.

Mallory & Maxwell, for appellant. *John C. Avery*, for appellee.

TAYLOR, J. The appellee sued the appellant in the Circuit Court of Escambia county, in case, for damages for its failure to transmit and deliver a telegraphic message in cipher. The suit resulted in a judgment for the plaintiff in the sum of \$688.88, and therefrom the defendant telegraph company appeals.

The declaration alleges as follows: "That the Western Union Telegraph Company, a corporation, the defendant, on the 12th day of December, 1887, was engaged in the business of transmitting telegraphic messages between Pensacola, Fla., and New York, in the state of New York, and in the delivery thereof to other cable and telegraph companies for transmission to Liverpool, England, where the said plaintiff had a regular merchant, broker or agent, to wit, one A. Dobell, through whom the plaintiff negotiated, by means of such messages, the sale in Europe of cargoes of lumber and timber, the plaintiff being then and there a timber and lumber merchant at the city of Pensacola. That on said day the plaintiff delivered to the defendant, and the defendant received from him at its office in the city of Pensacola, and undertook to transmit and cause to be transmitted, and it was its duty to transmit and cause to be transmitted, to the said A. Dobell, the following cipher message: 'Dobell, Liverpool: Gladfulness—shipment—rosa—bonheur—luciform—baneworth—margin'—which the said Dobell would have understood, and the plaintiff intended to be an offer of a cargo of lumber and timber from said port of Pensacola for sale through the said Dobell in Europe, and the said Dobell would have sold the same for the plaintiff on the terms of said offer at a profit to the plaintiff of twelve hundred dollars, but the defendant failed and neglected to send the said message, in violation of its duty to the plaintiff, and to the plaintiff's loss of \$1,200," and, therefore, he sues, etc.

At the trial the plaintiff, over the defendant's objection, was permitted to testify, in establishment of the damages claimed, that he had to sell his cargo of lumber in Europe upon the market for the best price he could get, which was fifty-two shillings a load, and which amounted to \$630.84 less than the price at which he offered same for sale in the message failed to be sent. The overruled objection of the defendant to this testimony was that the damage sought to be shown thereby was too remote, and was not in the contemplation of the parties at the time of the alleged making of the contract for the transmission of said message. To this ruling the defendant excepted, and it is assigned as error. The question presented is, what is the proper measure of damages to be recovered of a telegraph company holding itself out to the service of the public for hire, as the transmitter of messages by electricity, upon its failure to transmit or deliver a message written in cipher, or in language unintelligible except to those having a key to its hidden meaning. As this question has heretofore been passed upon by this court contrary to the views we find it impossible to become divested of, and, as we think, contrary to the great weight of the well-reasoned adjudications both in this country and in England, we take it up with diffidence that finds no palliative in the fact that the decision heretofore was by a divided court. *Telegraph Co. v. Hyer*, 22 Fla. 637; 1 South. Rep. 129. In that case the majority of the court, while approving the following well-established rule first formulated in reference to carriers of goods in the cause celebre of *Hadley v. Baxendale*, 9 Exch. 341: "Where two parties have made a contract, which one of them has broken, the damage which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it" — hold that it has no applicability to the contracts of telegraph companies for the transmission of messages, and that such companies may be justly considered and treated as standing alone — a system unto itself. The reasoning leading to this conclusion is as follows: "The common carrier charges

different rates of freight for different articles, according to their bulk and value, and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower, as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that, if its importance had been disclosed to the operator, he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission; that he was to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies employed, or the compensation demanded for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which, in consideration thereof, he had agreed to perform, and which the law, in consideration of his promise and the reception of the consideration therefor, had already enjoined on him." The answer to all this is that the same argument is equally applicable as a reason why the rule in *Hadley v. Baxendale* should not apply to carriers of goods for hire. The carrier of goods, in contracting to carry and deliver, deals with the tangible. When he contracts, he has in his mind's eye, from the visible, tangible subject of his contract, what will be the probable damage resulting directly from a breach of it on his part, and so has the other party to the contract with the carrier. Therefore, the damage likely to flow from a breach by the carrier can properly be said to enter mutually into the contemplation of both parties to the contract, and it is this mutuality in the contemplation of both parties to the contract of the results that will be likely to flow directly from its breach that really furnishes that equitable feature of the rule that the damages thus mutually contemplated are in fact the damages that the law will impose for the breach. Why? Because, in the eye of the law, the parties having mutually con-

templated such damages in going into such contract, those damages can alone be inferred as having entered into their contract as a silent element thereof. The rule in *Hadley v. Baxendale* is applicable alone to breaches of contract, and formulates concisely the measure of damages for the breach of those contracts that do not within themselves, in express terms, fix the penalty to follow their breach. In other words, this rule does nothing more than to give expression to that part of the contract which, in the eye of the law, has been mutually agreed upon between the parties, but concerning which their contract itself is silent. This essential leading feature of the rule, we think, was wholly lost sight of in the discussion of the question in *Telegraph Co. v. Hyer*, *supra*, i. e., that the damages provided for under the rule arise *ex contractu*, and that, unless there is mutuality in all the essential elements that enter into or grow out of the contract, the whole fabric becomes unilateral and abhorrent in the eyes of the law. The assertion, as a rule of law, that one party to a contract shall alone have knowledge that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover of the other party to the contract all of such, to him, unforeseen, unexpected, untemplated, non-consented-to damages, seems to us to be a complete upheaval of all the old landmarks in reference to damages upon broken contracts, and the establishment of a new rule, that is neither fair, just nor equitable, and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied under like conditions, to every violated contract where individuals are the contracting parties. The argument in *Telegraph Co. v. Hyer*, *supra*, that it was not shown that the telegraph company would have charged more, or used more dispatch, or taken more care, or been aided in any way in the performance of its duty, if it had been informed of the contents or purport of the message contracted to be sent in that case, is entirely foreign to the question. In arriving at the rule of law as to the damage that parties to contracts are entitled to, as matter of legal right, upon breach thereof, a consideration of anything that might or might not in fact have prevented the wrongful breach has nothing to do with the subject whatever. But we are to look to and consider the mutual rights of the parties from the inception of the contractual rela-

tions between them down through the contract itself to the breach complained of. One of the primary rights that each party has, who is about to enter into a contract with another, a breach of which may result in damage, is to be so situated that he may foresee what direct, probable results will reasonably and in the usual course of events follow bad faith, neglect or other breach upon his part. Why? Not that it will or will not in fact deter him from being delinquent, but that he may, if he will, so act as to guard against and avoid, for his own benefit, the foreseen, calamitous consequence, or that he may, if he does not, be held to have knowingly and willingly subjected himself to the contemplated consequences of his wrong, that, from being foreseen and contemplated, the law will impute his consent thereto.

That the rule formulated in *Hadley v. Baxendale*, *supra*, is the one properly applicable to the contracts of telegraph companies for the transmission of messages has the support of the overwhelming weight of the decided cases, not only as to the numerical strength of the decisions concurring therein, but in the logical soundness of the reasoning upon which their conclusions rest, as will be seen from the following authorities: *Telegraph Co. v. Hall*, 124 U. S. 444; 8 Sup. Ct. Rep. 577; *Sanders v. Stuart*, 1 C. P. Div. 326; *Behm v. Telegraph Co.*, 8 Biss. 131; *White v. Telegraph Co.*, 14 Fed. Rep. 710; *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Telegraph Co. v. Graham*, 1 Col. 230; *First Nat. Bank v. W. U. Tel. Co.*, 30 Ohio St. 555; *Candee v. Telegraph Co.*, 34 Wis. 471; *Daniel v. Telegraph Co.*, 61 Tex. 452; *Beaupre v. Telegraph Co.*, 21 Minn. 155; *True v. Telegraph Co.*, 60 Maine, 9; *Squire v. Telegraph Co.*, 98 Mass. 232; *Telegraph Co. v. Wenger*, 55 Penn. St. 262; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Telegraph Co. v. Gildersleve*, 20 Md. 232; *Telegraph Co. v. Kirkpatrick*, 76 Tex. 217; 13 S. W. Rep. 70; *Cannon v. Telegraph Co.*, 100 N. C. 300; 6 S. E. Rep. 731; *Landsberger v. Telegraph Co.*, 32 Barb. 530; *Manville v. Telegraph Co.*, 37 Iowa, 214; *Telegraph Co. v. Edsall*, 63 Tex. 668; *Hibbard v. Telegraph Co.*, 33 Wis. 558; *Thompson v. Telegraph Co.*, 64 Wis. 531; 25 N. W. Rep. 789; *Abeles v. Telegraph Co.*, 37 Mo. App. 554; *Telegraph Co. v. Cornwell*, 2 Col. App. 491; 31 Pac. Rep. 393; 3 Suth. Dam. 298; *Wood's Mayne Dam.* 40; *Thomp. Elect.* §§ 311-316, inclusive, 346, 358-375, inclusive.

Opposed to this array of authorities are the following decisions by divided courts, with the exception of the Georgia and Mississippi cases: *Telegraph Co. v. Hyer*, *supra*; *Daughtery v. Telegraph Co.*, 75 Ala. 168; 89 Ala. 191; 7 South. Rep. 660; *Telegraph Co. v. Way*, 83 Ala. 542; 4 South. Rep. 844; *Telegraph Co. v. Fatman*, 73 Ga. 285; *Alexander v. Telegraph Co.*, 66 Miss. 161; 5 South. Rep. 397. The case of *Telegraph Co. v. Reynolds*, 77 Va. 173, is also cited as sustaining a contrary rule, but a careful reading of that case will disclose the fact that the conclusions reached are predicated upon a statutory provision in their Code. In the case at bar, the message that it is alleged the defendant company failed to send was in cipher, and contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the "Horse Fair" painting by the great artist, Rosa Bonheur, named in the message, or whether it related to a matter of dollars and cents. There was no explanation made to the operator as to its meaning or importance, except that the plaintiff said that the word "gladfulness," in the message, had a special meaning. What that special meaning was, he did not disclose. Under these circumstances, all that the plaintiff could rightfully recover for the defendant's failure to send or deliver the message would be nominal damages, or, at most, the sum paid by him as the price of its transmission. It was error, therefore, for the court to admit testimony as to the damage sustained by the plaintiff by the loss of sale of a cargo of timber consequent upon the failure to forward the message.

There is another feature presented in the proofs, aside from all that has been said upon the rule of damages in such cases, that would prevent the recovery had in this case. The plaintiff himself testifies that he received from his agent, Dobell, in Europe, an offer for the cargo of timber. What that offer was, is nowhere stated or shown. Then he says: "I decided to make a final proposition, which I did by taking the message to the telegraph office, that was not sent, which message, when translated, was an offer by me of said cargo of timber for sale at 54 shillings per load." Then he says that he missed the sale of the cargo at the terms offered by him in his message in consequence of the defendant's failure to send it, and consequently had to sell on the market for the best price he could get, which was fifty-two shillings

per load. There is not a word of proof in the record to show that his offer contained in the unsent message would ever have been accepted, or that he could ever at any time have sold the timber at the price at which he so offered it, or that it could ever have been sold at any greater price than the one he actually received for same, whether his message had been sent or not. Yet, in the face of this state of the proofs, damages have been allowed to the plaintiff equal to the difference between a price at which he simply offered his timber for sale, and the price actually received by him for it, without a word of proof to show whether the higher price at which he offered it for sale could ever have been obtained for it or not.

The appellee contends that because of the decision in *Telegraph Co. v. Hyer*, supra, the question of damages cannot be considered; that, as to this case, it is *stare decisis*. This doctrine, as we understand it, is properly applicable to decisions furnishing rules of property, and those construing statutes, and to those passing upon the validity of contracts in which investments have or may have been made upon the faith of the adjudication as to their validity, in which cases former decisions upon the same questions will be adhered to, but we do not think this case falls within the rule.

In reversing the former ruling of the court in the *Hyer* case, we do not interfere with any vested right acquired upon the faith of that adjudication, but pass upon the rule of damages, as upon an abstract proposition, to follow the breach of such contracts. Of the erroneousness of the rule as laid down in that case, we are perfectly and clearly satisfied; and in such case, in determining the propriety of overruling it as a solemn adjudication, we are to be governed largely by a consideration of the results that will likely flow from the enunciation and establishment of the one or the other of the two rules. If, in such case, we conclude that the affirmance of what we deem to be the erroneous rule in that case will be productive of more far-reaching and harmful results than would follow the disaffirmance thereof, then it becomes our duty to overturn it, and such we think would be the result here. Besides being unilateral and wholly unfair, as we have before stated, we cannot see why, if the protection of

the rule in *Hadley v. Baxendale* is to be withheld from contracts with telegraph companies, it should not also be denied in the daily recurring contractual controversies between individuals. To overturn the rule in controversies as between man and man, would be such an uprooting of the old landmarks as to make it impracticable to surmise the harmful results that would follow. Entertaining these views, we do not think that the doctrine of *stare decisis* constrains us to adhere to the rule in the *Hyer* case, but think that less harm will follow our return to the well-beaten and familiar track that furnishes a plain and easily comprehended rule for all contracting parties, be they corporate or individual.

The judgment appealed from is reversed, and a new trial ordered.

RANEY, Ch. J. (concurring). A reconsideration of the question of the measure of damages involved here confirms the correctness of the view expressed in my dissenting opinion in *Telegraph Co. v. Hyer*, 22 Fla. 649 et seq.; 1 South. Rep. 129, and I concur in the opinion of Judge Taylor, that the rule followed in the case mentioned is unfair, and ought not to be perpetuated; and, without committing myself further upon the question of *stare decisis*, my conclusion is that more injury will result in the future from adhering to the rule of the *Hyer* case than will accrue to parties to past transactions from changing it, and that the judgment should be reversed. Cooley Const. Lim. (5th ed.) 65, and note 1; Wells Res. Adj. § 624 et seq.; Chamberlain *Stare Dec.* 19.

MABRY, J. (dissenting). The question of liability to damage for a failure on the part of a telegraph company to send a cipher message is not a new one in this court. Over six years ago this question was deliberately settled here by the decision in the case of *Telegraph Co. v. Hyer*, 22 Fla. 652; 1 South. Rep. 129. It is proposed now to reverse this case, and my view is that it should not be done. Every question in reference to cipher messages entering into the case now before us was fully discussed and maturely considered in the *Hyer* case, and this case has the support of decisions in Alabama, Mississippi, Georgia and Virginia. Under the decision in the *Hyer* case, there was a remedy for damages for a failure on the part of a telegraph company to send a cipher

message, when it had, for compensation, agreed to do so. There is much merit in the rule that, where the company holds itself out to the public as a transmitter of cipher messages for pay, it should not be allowed, after receiving the money and agreeing to send the message, to deny its liability for damages resulting from its own violation of duty on the ground that the message was in cipher, and its contents not known to the company when it agreed to send it. This court having planted itself in favor of this rule over six years ago, I do not think we should now disturb it. I do not see how greater harm will result from adhering to the decision than overruling it.*

TELEGRAPH COMPANIES — RECENT DECISIONS.

1. Cipher dispatches — damages for negligence in respect thereto.— See 1 Am. R. R. & Corp. Rep. 386, note; 4 Am. R. R. & Corp. Rep. 672, note 6; *Primrose v. Western Union Tel. Co.*, post.

2. Right of sendee of message to sue for neglect to send or deliver message.— The person to whom a telegraph message is sent has a right of action for breach of the contract to transmit, made by the person sending it, when the message shows on its face that it is for the benefit of the former, though the compensation for transmitting it was paid by the sender, and was afterwards returned to him by the company, and though the sendee had not been previously constituted the sender's agent for that purpose. *Western Union Tel. Co. v. Berringer*, 84 Tex. 38; 19 S. W. Rep. 336. To same effect: *Western Union Tel. Co. v. Jones*, 81 Tex. 271; 16 S. W. Rep. 1006; *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; 9 South. Rep. 414; *International Ocean Tel. Co. v. Saunders*, post.

3. Right of person interested in message to sue, though neither sender nor sendee.— In an action against a telegraph company for failure to deliver a message, the complaint showed that the telegram was sent by plaintiff's sister, who was left in charge of his house, and its cost prepaid out of plaintiff's funds, and that it was directed to his father, at whose house plaintiff was staying, requesting the father to tell plaintiff to come home, as his daughter was very ill. It further alleged that the telegram was sent for the use and benefit of plaintiff, and that defendant contracted to deliver it by special delivery. Held, that plaintiff had a right to maintain an action. *Sherill v. Western Union Tel. Co.*, 109 N. C. 527; 14 S. E. Rep. 94.

4. What amounts to actionable negligence or breach of duty in regard to message.— *Duty as to delivery when message sent in care of another.*— Where a telegram is sent over defendant's wires to plaintiff in care of "Mr. B.," and there is no person by the name of "B." in the place to which the message is sent, and defendant makes no effort to find plaintiff in order to deliver it to him, defendant is liable in damages. *Western Union Tel. Co. v. Houghton*, 82 Tex. 561; 17 S. W. Rep. 846.

* Reported in 14 South. Rep. 1.

Duty of company to send by competing line when its own line disabled.— Upon presentation of a telegram, which the sender states to be important, and requests that it be sent immediately, it is the duty of the telegraph company, if its line is down, and it is not known how soon it may be restored, either to inform the sender of that fact, that he may transmit it over a competing line, which is equally available to him, or to itself cause the immediate transmission of the message over the competing line, and the failure of the operator to do so is not excused by the fact that he believed, or thought he had reason to believe, that the line would soon be in working order, the line having already been down for an hour, and the place or cause of the break not having been located. *Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. Rep. 738.

5. Connecting lines—liability for delay by.— A telegraph company, upon a receipt of a message for transmission to a point beyond its line, sent it to defendant to be forwarded, and paid the latter one-half of the sum collected from the sender. Held, that defendant was liable for delay in delivering the message, and the court erred in directing a verdict for defendant, on the ground that it was merely the agent of the other company. *Smith v. Western Union Tel. Co.*, 84 Tex. 359; 19 S. W. Rep. 441.

6. Failure to deliver when sendee not within free delivery limits.— In a suit for damages for failure to deliver messages the company answered that the messages were written on blanks, which had thereon printed stipulations that messages would be delivered free within the established free delivery limits of the terminal office; that for a greater distance a special charge would be made to cover the cost of delivery; that the person to whom the messages were addressed did not reside within the free delivery limits, which were one-half mile each way from the company's office; and that no charges were paid or guaranteed for special delivery. Held, that the answer stated a good defense. *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; 19 S. W. Rep. 285.

7. Defenses—message not in writing.— Defendant, having received and transmitted a message, cannot excuse its delay in delivering it by setting up that the message was not in writing, and that it was not bound to receive it in the first instance. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; 9 South. Rep. 414.

8. Effect of contributory negligence of plaintiff—what amounts to such negligence.— In an action by a father and his son against a telegraph company for failure to deliver a message it appeared that the son, a boy fifteen years old, broke his arm, and on the same day his mother, in his father's absence, telegraphed for her physician. The telegram was not delivered for nine days, and no excuse was offered by defendant. No further effort was made by the parents to obtain a physician until it was too late to save the arm. Held, that the father should not have recovered because of his contributory negligence, but a judgment for the son was proper. *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420; 15 S. W. Rep. 1048.

Plaintiff, a member of the Straw Board Association, received from its manager a telegram, dated the day before, that the price of the straw boards had been advanced. A few hours later plaintiff received another dispatch, bearing date the day of its receipt, that the old price had been restored. By mis-

take of the telegraph company a duplicate of the first message was afterwards delivered to plaintiff at about midnight of the same day. Held, that plaintiff had a right to rely on the presumption that the last message was an original dispatch duly transmitted; and, though such message was marked with the word "Dup.," and bore date the same day as the first one, plaintiff's failure to detect that it was in fact a duplicate did not amount to such a want of ordinary care as would prevent it from recovering the damages it had sustained by acting on the belief that, after the old price had been restored, it had been again advanced, as stated in the last message. *Western Union Tel. Co. v. Virginia Paper Co.*, 87 Va. 418; 12 S. E. Rep. 755.

Plaintiff's sister had disappeared, and he, fearing that she had been drowned, went to New York, and, before returning home, left word at different morgues, among them those on Staten Island, to telegraph him at once in case his sister's body was found. A few days afterwards he received the following message: "May 12, 1889. Quarantine, S. C. To Daniel S. Tobin, McKeesport, Pa.: Found the body of Mary E. Tobin. Coroner Hughes, Clifton, S. C." By mistake of defendant "S. C." was written for "S. I.," the common abbreviation for Staten Island. Held, that the plaintiff was not guilty of contributory negligence in going to South Carolina without making inquiry of defendant's agents. *Tobin v. Western Union Tel. Co.*, 146 Penn. St. 375; 23 Atl. Rep. 324.

9. Duty of plaintiff to exercise care and diligence to avoid loss.—Where plaintiff went to Chicago to buy materials for a building and telegraphed for his plans, which message was never delivered, and he sued for expense, loss of time and damages by a rise of materials, it was held that the refusal to instruct the jury that it was plaintiff's duty to use reasonable efforts to avoid or lessen his damage, and if a reasonably prudent business man would have sent another telegram for the plans, and if such telegram had been sent the plans would have reached plaintiff in time to have consummated his contract, then plaintiff is only entitled to compensation for the value of his time and expense during the extra time he would have been kept at C. on account of the delay, was error. *Gulf, C. & S. F. R. Co. v. Loonie*, 82 Tex. 323; 18 S. W. Rep. 221.

10. Measure of damages in particular cases.—Plaintiff deposited money with defendant telegraph company, to be transmitted to a bank for the payment of plaintiff's note due on that day, but because of defendant's failure to notify the bank until the day following, the note went to protest. Held, that, in the absence of pecuniary loss resulting from defendant's failure, plaintiff cannot recover for damages to his credit. *Smith v. Western Union Tel. Co.*, 150 Penn. St. 561; 24 Atl. Rep. 1049.

A telegraphic message instructing the levying of an attachment was delayed in transit, and in consequence other creditors obtained priority over the sender's attachment. The debtor's property was not sufficient to pay the amount of the debt of the first attaching creditors, but would have been sufficient to satisfy the debt due to the sender of the telegram if his attachment had obtained priority. The telegraph company was informed by the terms of the message of the danger of loss to the sender, and was expressly requested to transmit the message immediately. Held, that, in an action against the tele-

graph company for damages, the measure of damages was the amount of the sender's debt. *Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. Rep. 738.

In an action against a telegraph company for delay in delivering a message, where it appeared that plaintiff, who was constructing a building, went to C. for materials, leaving his plans with his workmen; that afterwards he telegraphed that the plans be sent to C., but the message was not delivered; that while at C. he agreed on the materials and prices, but could not conclude contracts for the material in the absence of the plans; that afterwards the price of the material advanced—an instruction that plaintiff's measure of damage was "the amount he paid for the message, the value of plaintiff's time lost, and the difference he had to pay by reason of the advance in the price of material" was properly given. *Gulf, C. & S. F. R. Co. v. Loonie*, 82 Tex. 323; 18 S. W. Rep. 221.

Where a telegraph company neglects to deliver a message to a live-stock shipper as to the state of the market at a certain point, in consequence of which neglect the shipper sends his stock to the next nearest market, at which he receives ten cents per hundred less than the market price for the same stock ranged at the first point on the same day, the shipper is entitled to recover from the telegraph company the difference between the market prices of the two points, with the difference in freight added. *Western Union Tel. Co. v. Collins*, 45 Kans. 88; 25 Pac. Rep. 187.

In an action for delay in transmitting a telegram sent by an agent at K. to plaintiff, his principal, at C., giving the prices at which mules could be bought at K., there was evidence that the agent had contracted for sixty-four mules at the price named in the message, subject to plaintiff's ratification, but that on account of the delay in transmitting the message the agent was not authorized to close the contract until mules had advanced in price, and the offer had been withdrawn. Plaintiff had contracted to sell in C. the mules, for the purchase of which his agent had been sent to K.; but, owing to the failure of plaintiff to get the message in due season, his customer rescinded the contract. Held, that the measure of damages for failure to make this sale was not the difference between the price at which they could have been bought in K. if the message had been delivered in due time, and the price at which he had contracted to sell them, but that difference less the expense of transportation to C. *Western Union Tel. Co. v. Brown*, 84 Tex. 54; 19 S. W. Rep. 336.

In an action against a telegraph company for failure to deliver a message, it appeared that plaintiffs were threshers, and their agent at V. wired them: "Have 30,000 bushels for you, if you can come at once." Plaintiffs answered: "Will ship machinery at once." The latter message was not delivered, and some of the parties for whom threshing was to be done, not knowing that the offer was accepted, made other contracts. Held, that defendant was liable for the loss of the contracts, though there was no delay in getting the machine to V., and that plaintiffs were entitled to recover the amount of profits they would have made out of the contracts so lost. *Western Union Tel. Co. v. Bowen*, 84 Tex. 476; 19 S. W. Rep. 554.

Where special damages are claimed the facts should be alleged which show such damage, or only nominal damages will be recoverable. *Acheson v. Western Union Tel. Co.*, 96 Cal. 641; 31 Pac. Rep. 583.

11. Sunday messages — validity of contract to send.— The notification to a person of the death of his father, and a request to attend his funeral, involve such a moral necessity that a contract to send a telegraphic message for that purpose is valid, though made on Sunday. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; 9 South. Rep. 414. So, where the complaint shows that the message was addressed to a doctor, notifying him that the sender's daughter was ill, and asking him to come at once, it is sufficiently shown that there was a reasonable necessity for sending the message on Sunday. *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46; 27 N. E. Rep. 113.

12. Suits for statutory penalties — statutes construed.— A statute of Georgia, Acts 1887, page 111, provides, section 1, that telegraph companies shall, during the usual office hours, receive dispatches, and on payment or tender of the usual charge "shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars," and, section 2, "that such companies shall deliver all dispatches to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same, provided such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is." It is held that the statute is penal and to be strictly construed, and, accordingly, that the sendee of a message is not, under the act, entitled to recover the penalty therein named for a failure by the company to deliver such message with due diligence, unless the charges thereon were prepaid or tendered by the sender, or unless there was failure to deliver, or delay in delivering, on or after payment or tender by the sendee or his agent, though the company waives prepayment and sends the message "collect." *Langley v. Western Union Tel. Co.*, 88 Ga. 777; 15 S. E. Rep. 291. "The statutory penalty," says the court, "is given solely for failure in the duty prescribed by the act, and not for failure to perform a duty voluntarily assumed, and arising merely from the contract of the parties. By the terms of the act, no duty is imposed until payment or tender." Telegraph companies are subject to the penalty prescribed for not transmitting dispatches with due diligence, whether the persons to whom they are addressed reside within one mile of the telegraphic station, or within the city or town in which such station is located, or not. The proviso in the second section of the act relates to the duty of delivery, and not to the duty of transmission. *Horn v. Western Union Tel. Co.*, 88 Ga. 538; 15 S. E. Rep. 16. A transient visitor to a town or city, who furnishes to the company no definite address, is not a person residing in the same or within one mile of the station, in contemplation of the act. *Moore v. Western Union Tel. Co.*, 87 Ga. 613; 13 S. E. Rep. 639. After receiving a telegram for transmission, and accepting payment for the same, the company cannot defend an action for the statutory penalty incurred by failure to deliver it with due promptness, on the ground that the contents of the telegram related to a sale of futures, and consequently to an illegal transaction. *Gray v. Western Union Tel. Co.*, 87 Ga. 350; 13 S. E. Rep. 562. A provision in a telegraph blank that all claims for damages for negligence in sending the dispatch shall be made in writing within a certain time, or the company shall not be liable, does not apply to an action for a statutory penalty for such negligence. *Western Union Tel. Co. v. Cooledge*, 86 Ga. 104; 12 S. E. Rep. 264.

Revised Statutes of Missouri, 1889, section 2725, making it the duty of every telegraph company to provide sufficient facilities for the dispatch of the business of the public, to receive dispatches from and for other telegraph lines and from or for any individual, and, on payment or tender of their usual charges for transmitting dispatches, to transmit the same promptly and with impartiality, under a penalty of \$200 for every neglect or refusal so to do, does not render a telegraph company liable for negligent failure to deliver a message to a person in another state, but only for failure to receive and transmit it. *Connell v. Western Union Tel. Co.*, 108 Mo. 459; 18 S. W. Rep. 883.

Act of Arkansas, March 31, 1885, imposing a penalty on a telegraph company for refusing to "transmit over its wires to localities on its line" any message tendered for transmission, does not impose a penalty for the company's refusal to deliver a message after it has been transmitted over its wires to the locality on its line to which it is addressed. *Brooks v. Western Union Tel. Co.*, 56 Ark. 224; 19 S. W. Rep. 572.

HEDGES ET AL. v. DIXON COUNTY.

(Supreme Court of the United States, November 13, 1893.)

1. MUNICIPAL BONDS. AN ISSUE OF BONDS IN AID OF A RAILROAD IN EXCESS OF LIMIT IS VOID IN TOTO AND CANNOT BE ENFORCED TO EXTENT AUTHORIZED. Where a State Constitution permits counties to donate their bonds, not exceeding a certain percentage on the assessed valuation, to railroad companies, a donation in excess of the prescribed percentage is void in toto; and the holders of such bonds cannot maintain a bill to have the issue scaled down to the amount which might lawfully have been donated and to declare the issue valid to that extent.

2. REMEDY IN EQUITY. Neither have the holders of such bonds any remedy in equity to enforce any part of such bonds either on the theory that the county has received a consideration therefor in the construction of the railroad, or intended to make a valid donation, or otherwise.

3. Equity follows the law, and where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it.

J. M. Woolworth, for appellants. *John M. Thurston*, for appellee.

JACKSON, J. The question presented by the record in this case is whether parties holding the greater part of a series of bonds issued by a county in excess of the limit fixed by the Constitution of the state, and which for that reason are not enforceable at law, can invoke the aid of a court of equity to afford them relief, by

first ascertaining the extent of such excess, or settling the amount of bonds which the county could lawfully have issued, and then proceeding to scale down the issue to the limit thus ascertained, and to declare such excess only to be void, and thereupon decree the residue of such bonds good and valid, and enforce payment of such residue, with interest, against the county. Or, in other words, can the holders of bonds issued by a county in excess of its authority, by an offer to surrender and cancel so much of such bonds as may, upon inquiry, be found to exceed the limit authorized by law, invest a court of equity with jurisdiction, not only to ascertain the amount of such excess, but to declare the residue of such bonds valid and enforce the payment thereof against the county?

The appellants, being the holders of nearly the entire issue of \$87,000 in bonds of the county of Dixon, which were by that county issued and donated to the Covington, Columbus and Black Hills Railroad Company, January 1, 1876, filed their bill in May, 1888, in the Circuit Court of the United States for the district of Nebraska, setting forth, among other things, that by a vote of the electors of the county held on December 27, 1875, the bonds in question were authorized to be issued to the railroad company; that they became the holders thereof, relying upon recitals contained therein, and the certificates indorsed thereon, and believing them to be binding and valid obligations of the county; that, when the interest coupons matured, payment was refused by the county officials, who alleged that the bonds were invalid because they exceeded in amount ten per cent of the assessed valuation of the property of the county at the time of their issuance. The bill further alleges that complainants had offered to surrender up for cancellation such amounts of the bonds as exceeded ten per cent of the assessed valuation of the property of the county, each holder surrendering his proportionate share of such excess; that this offer was refused by the county, which, complainants insist, cured any infirmity in the bonds, and that the county was equitably bound to recognize as valid the residue thereof, because it and its citizens had received, in the construction of the railroad which the bonds were issued to promote, all the consideration that was intended to be secured thereby. The prayer of the bill

was that an account might be taken to ascertain the excess of the issue over ten per cent of the assessed valuation of the property of the county ; that such excess might be distributed among the holders of the bonds, or be applied to reduce the amount of each bond ratably, so as to bring the entire issue within the limit authorized by law ; that the residue might be declared good and valid, and that the county might be decreed to pay the same, with interest at the rate of ten per cent from January 1, 1876, to the date of the decree.

The county demurred to the bill on the ground that the complainants had not, in and by their bill, stated such a case as to entitle them to the relief sought. This demurrer was sustained by the court, and, the defects being of such a character that they could not be remedied by amendment, a decree was entered dismissing the bill. 37 Fed. Rep. 304. From that decree the present appeal is prosecuted.

The bonds in question were made payable to the Covington, Columbus and Black Hills Railroad Company, or bearer, and were put in circulation by that company, with its indorsement thereon, guaranteeing to the holders the payment of the principal and interest of the bonds, according to the tenor thereof, at the place where, and as the same became due and payable. The only consideration received by the county in the transaction was the incidental benefit derived from the construction of the railroad, the proceeds of the bonds, when negotiated, being received directly by the railroad company. The theory of the bill is that the bonds are void only to the extent that they exceed ten per cent of the assessed valuation of the property of the county at the time of their issuance, and upon the abatement of that excess the holders are entitled to have the residue thereof, which the county could have lawfully issued, treated as valid, because of the incidental benefits derived from the construction of the road, which was sought to be secured by the donation of bonds.

The complainants, by their bill and exhibits thereto, have presented the same state of facts which were considered in *Dixon Co. v. Field*, 111 U. S. 83 ; 4 Sup. Ct. Rep. 315, where the bonds in question were directly involved, and were held by this court to be void because they exceeded, in the aggregate, the sum of ten per cent of the assessed valuation of the property of the county

at the time of their issue. This decision was based upon section 2, article 12, of the Constitution of the state of Nebraska, which provides as follows: "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law; provided, that such donations of a county, with the donations of such subdivisions, in the aggregate shall not exceed ten per cent of the assessed valuation of such county."

While the complainants concede that the issue of bonds was in excess of what the county was authorized to donate under this provision of the Constitution, and for that reason were invalid at law, they insist that a promise to pay so much thereof as could have been lawfully issued should be implied, and enforced against the county, under the principle applied in *Louisiana v. Wood*, 102 U. S. 294, and in *Read v. City of Plattsburgh*, 107 U. S. 568; 2 Sup. Ct. Rep. 208. Those cases are clearly distinguishable from the present. In *Louisiana v. Wood*, by the act of the city, the bonds bore a false date, which apparently made them obligatory and binding. They were sold by the city, and purchased by the holder in good faith, and the money paid therefor went directly into the city's treasury. This court held that the city was in the market as a borrower, and received the money in that character, notwithstanding the transaction assumed the form of a sale of her securities, which, being defectively executed, a suit could not be maintained thereon, and that the holder was entitled to recover the money paid, with interest thereon from the time the obligation of the city to pay was denied.

In *Read v. City of Plattsburgh* the bonds were issued by a city for the purpose of raising money wherein to construct a high school building within her limits. The bonds were sold, and the proceeds applied to that purpose. The legislature subsequently legalized the proceedings of the city in the premises; but this act of the legislature was passed after the Constitution of the state went into effect, declaring that the "legislature shall pass no special act conferring corporate powers," and that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A purchaser of the bonds, for value, without notice of

any infirmity in their issue, brought suit to recover the amount of the coupons then due and unpaid. It was held that as, by force of the transaction, the city was bound to refund the moneys paid it in consideration of its void bonds, and as the act, by confirming them, merely recognizes the existence of that obligation, and provides a medium for enforcing it according to the original intention of the parties, no new corporate powers were thereby conferred. In this case, as in *Louisiana v. Wood*, the city got the full pecuniary consideration for the bonds, and applied the money to the very purpose for which they were issued; and upon well-settled principles, if the securities given for the money so obtained proved invalid or defective for any reason, there was a clear legal, as well as moral, obligation to refund the money which had been so advanced to, and received by, the city. The circumstances and conditions which gave the holders of the bonds an equitable right, in those cases, to recover from the municipality the money which the bonds represented, do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued.

Moreover, by the provisions of the Constitution of the state of Nebraska, and by the express terms of the proposition submitted to the vote of the people of Dixon county, the bonds in question were issued as a donation to the railroad company; and, being intended as a donation, it cannot properly be said that the purchasers of these bonds from the railroad company paid any consideration therefor to the county, so as to raise any equity, as against it, for the amount represented by the bonds, or any part thereof. Any equitable demand which might, under the circumstances, have existed against the county, on the theory of consideration received, was in favor of the railroad company which constructed the railroad, and thereby conferred all the incidental benefits which the county derived from the transaction. If any equitable claim arises in favor of the holders of the bonds, it must be against the railroad company, from whom the bonds were pur-

chased, and by whom their payment was guaranteed, as that company was the recipient of the legal consideration realized upon the negotiation of the bonds.

Again, the Constitution of the state having prescribed the amount which the county might donate to a railroad company, that provision operated as an absolute limitation upon the power of the county to exceed that amount; and it is well settled that no recitals in the bonds, or indorsed thereon, could estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same. Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority, as against a bona fide holder for value; but, when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds. *Lake Co. v. Rollins*, 130 U. S. 662; 9 Sup. Ct. Rep. 651; *Same v. Graham*, 130 U. S. 674; 9 Sup. Ct. Rep. 654; *Sutliff v. Commissioners*, 147 U. S. 230; 13 Sup. Ct. Rep. 318.

But, aside from this view of the subject, the bill proceeds upon the false assumption that the bonds in question were partly valid and partly void, and that the case is brought within the principle announced in *Daviess Co. v. Dickinson*, 117 U. S. 657; 6 Sup. Ct. Rep. 897. In that case, under authority conferred by statute, the county voted a subscription of \$250,000 to a railroad company, which was made, and, by order of the County Court, bonds of the county to that amount were ordered to be sold and disposed of by a committee, for the purpose of paying such subscription. The officers of the county, without authority, executed and issued bonds in the amount of \$300,000. The bonds, as they were delivered, were separately numbered, and entered upon the county register. The court held that the power to issue bonds was limited to \$250,000, and that the bonds issued in excess of that amount were unlawful and void. It was further held that bonds to the amount authorized, which were first issued and delivered, were valid, and entitled to payment. In that case there was a clear and well-defined line between the legal and illegal issues, which enabled the court to declare invalid such of the bonds as exceeded the amount authorized, and to hold that the illegal excess did not vitiate the bonds which were authorized, and legally

issued. There was no scaling of the entire issue, in that case, so as to bring it within the limits of the county's authority. The \$250,000 which the court pronounced valid had been expressly authorized by the county, and the bonds for that amount were readily separated from the \$50,000 excess, which had not been authorized. It did not, therefore, involve any investigation on the part of the court to ascertain what the county could lawfully issue, but was merely the identification of the bonds which it intended to issue. Again, the amount of the bonds issued was not based upon the assessed valuation of the property of the county, but was limited to the amount which the people of the county, by an election duly held, had determined should be issued. There is a radical difference in these respects between that case and the one under consideration.

What the county authorized and carried into execution, in the present case, both by the vote and by the donation, was one entire transaction; and, if it should be so reformed as to curtail the entire issue of bonds to such an amount as was within the constitutional limits of the county to donate, it would be something different from that which was voted by the county, and carried into effect by the issue of the bonds. This would involve the making of a different donation from what the county voted and intended to make to the railroad company.

It is urged that the vote and the issue of the bonds constituted a contract between the railroad company and the county, and that the bonds issued in pursuance thereof should be scaled, as sought by the bill, to bring the contract within the authority of the county; that, as the county intended to make a valid donation, such reduction of the amount of the issue, which the complainants offer to make, should be sanctioned by the court, and the residue declared valid. But the difficulty in the way of this suggestion is that, treating the transaction as a contract, it is not within the power of a court of equity to change its terms and provisions. Besides, it is not shown that the county would have voted a different amount from what was issued, or that it intended to issue a less amount. It is too well settled to need citation of authorities that a court of equity, in the absence of fraud, accident or mistake, cannot change the terms of a contract.

Again, if a right to the equitable relief sought by the com-

plainants could be worked out on the theory of a contract between the county and the railroad company, it would be necessary to establish that such contract actually existed, and was valid. In the present case, however, the county had no authority to vote the donation. In *Reineman v. Railroad Co.*, 7 Neb. 310, where an excessive issue of bonds had been voted by the county in aid of internal improvements, it was held by the Supreme Court of Nebraska that the vote was simply a void act, and conferred no authority on the county officials to issue the bonds of the county, either to the amount voted, or for any amount. It was urged in that case, as in this, that, even if it should be held that the proposition submitted to the electors was in excess of the amount authorized to be voted, still, to the extent that the county could have lawfully voted and issued such bonds, they should be treated as constituting a contract between the county and the railroad company, and to that extent be upheld. The Supreme Court of the state declined to accede to this view of the subject, and ruled that "the proposition submitted to the electors was an entirety, and indivisible. It exceeded the statutory limit, and was, therefore, wholly unauthorized. The election was simply a void act, conferring no authority whatever upon the county commissioners to issue bonds of the county in any amount whatever."

Several state decisions have been cited in support of the bill. *Johnson v. Stark Co.*, 24 Ill. 75; *City of Quincy v. Warfield*, 25 Ill. 319; *Briscoe v. Allison*, 43 Ill. 291; *State v. Allen*, 43 Ill. 456; *Stockdale v. School District*, 47 Mich. 226; 10 N. W. Rep. 349. But they mostly relate to taxes imposed beyond authority, and stand upon a different doctrine from that involved in the present case. We do not, however, deem it necessary to review them, for, if they can be construed to support a bill like the one under consideration, we think they are not founded upon correct principles, and are not in harmony with the decisions of this court.

In *Buchanan v. Litchfield*, 102 U. S. 278, bonds were issued by the city of Litchfield, under authority of a statute of Illinois and an ordinance of the city, for the construction of a system of water works for the use of the municipality. Neither the statute nor the ordinance contained any reference to the provisions of the Constitution prohibiting any county, city, township or school district from becoming indebted, in any manner or for any purpose,

to an amount, including existing indebtedness, in the aggregate, exceeding five per cent of the taxable property therein. The ordinance of the city made no reference to or mention of the indebtedness of the city, although, at that time, it exceeded the constitutional limit. A bona fide holder of the bonds brought suit upon the unpaid coupons thereto attached, and it was held that they were void, and could not be recovered. In this case the city was directly benefited by the issue of the bonds, which were negotiated for the sole purpose of erecting a system of public works. The holders of the bonds thereafter sought relief by a bill in equity against the city of Litchfield to enforce the payment of the money loaned, or which the city had received upon the issue of the bonds, and used in the construction of its public works. The question of their right to recover on the equitable consideration came before this court in *City of Litchfield v. Ballou*, 114 U. S. 190; 5 Sup. Ct. Rep. 820; and it was held that a provision in a State Constitution that a municipal corporation shall not become indebted in any manner, or for any purpose, to an amount exceeding five per cent of its taxable property therein, forbids implied as well as express liability for the amount or amounts received on bonds issued contrary to such provision, and that a court of equity could not afford relief in such a case either on an express or implied obligation; that the transaction, being invalid at law, was equally invalid in equity. This conclusion was reached after a full review of the authorities on the question, and the court denied the relief sought.

In *Insurance Co. v. Middleport*, 124 U. S. 534; 8 Sup. Ct. Rep. 625, the town of Middleport made an appropriation to a railroad company, to be raised by tax on the property of the town, and bonds of the town for a sum large enough to include interest and discount for which they could be sold and delivered were issued to the railroad company, by whom they were put in circulation. These bonds were declared void, and the insurance company, as a purchaser and holder, for value and without notice, of a portion thereof, sought, by a proceeding in equity, to be subrogated to the right of the railroad company to enforce payment of the amount of the appropriation voted by the town; but it was held that the purchase of these bonds by the holder was no payment of the appropriation voted by the town, and that the holder was not

entitled to claim the benefit of such appropriation, nor that the advantages conferred by the railroad company upon the town inured to the benefit of the holder, or constituted the basis of a consideration on which it could claim to be paid the sum appropriated for the railroad company. The proposition contended for in that case by the complainant was that, by its purchase of the bonds, which were supposed to represent the benefit conferred upon the town by the appropriation to the railroad company, it became entitled, in equity, to claim the payment of the amount represented by the bonds, on the basis of the original consideration. This contention was not sustained, and the complainant was denied the equitable relief sought.

The principle running through these decisions controls the case under consideration, and clearly establishes that the complainants are not entitled to the relief they seek. The fact that the complainants have no remedy at law, arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford them relief. The established rule, although not of universal application, is that equity follows the law, or as stated in *Magniac v. Thompson*, 15 How. 299, "that, wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim '*equitas sequitur legem*' is strictly applicable."

Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident or mistake to so modify it as to make it legal, and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof. These general propositions clearly establish that the present bill cannot be sustained, and our conclusion, therefore, is that there was no error in the judgment of the court below in dismissing the bill, and that judgment is accord-

ingly affirmed. Mr. Justice Harlan dissents from the conclusion in this case.*

MUNICIPAL AND RAILROAD AID BONDS—RECENT DECISIONS.

1. Power to issue generally.—Under act Indiana 1847, incorporating the city of Evansville, and authorizing the city "to borrow money for the use of the city," the city has power to issue bonds for money so borrowed. *City of Evansville v. Woodbury*, (Ct. of App.) 60 Fed. Rep. 718. When the power of a municipal corporation to issue negotiable paper is called in question, it will not be deduced from uncertain inferences, and can be conferred only by language which leaves no reasonable doubt of an intention to confer it. *Brenham v. Bank*, 144 U. S. 173; 12 Sup. Ct. Rep. 559, followed. *Coffin v. Kearney*, 6 C. C. A. 288; 57 Fed. Rep. 137.

Statutory authority to issue and market bonds, which are to run for a long period of time and bear interest, held to authorize, by implication, bonds negotiable in form. *Ashley v. Board of Supervisors*, (Ct. of App.) 60 Fed. Rep. 55. See *Dodge v. Memphis*, 51 Fed. Rep. 165.

2. Power to issue bonds — constitutional limitations upon amount of indebtedness.—The Constitution of Washington, article 8, section 6, declares that no city shall "for any purpose" become indebted "in any manner" to the amount exceeding one and one half per cent of its taxable property without the assent of three-fifths of its voters; "provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per cent additional, for supplying such city or town with water, artificial light and sewers," etc. Held, that indebtedness for water and sewage purposes is no part of the general indebtedness of a city, and need not be considered in determining whether the city has already reached its five per cent limit of general indebtedness. *Austin v. City of Seattle*, 2 Wash. 667; 27 Pac. Rep. 557. The above provision does not authorize the county commissioners to incur an indebtedness up to the one and one-half per cent in addition to any indebtedness which may have been incurred before such provision took effect, nor to submit to the people the question of validating any purported indebtedness they had attempted to incur in excess of the limitation. *Rehmke v. Goodwin*, 2 Wash. 676; 27 Pac. Rep. 473.

The Constitution of New York, article 8, section 11, restraining a city of over 100,000 inhabitants from becoming indebted for any purpose to an amount, including existing indebtedness, of more than ten per cent of the assessed value of its real estate, "except as herein otherwise provided," which exception includes the issue of water supply bonds, but for a term not to exceed twenty years, does not render void Laws 1892, chapter 358, authorizing the city of Rochester to issue such bonds for a term of fifty years, since the city, though by reason of its population subject to the restraint imposed, is not required to avail itself of the exception where its total indebtedness, with addition of the proposed bonds, does not reach the prescribed limit, and, therefore, the proviso in respect to the term of said bonds has no application. *City of Rochester v. Quintard*, 136 N. Y. 221; 32 N. E. Rep. 760.

* Reported in 150 U. S. 182; 14 Sup. Ct. Rep. 71.

The Constitution of Missouri, article 10, section 11, provides, inter alia, that in cities and towns having less than 10,000 and more than 1,000 inhabitants the annual rate of taxation shall not exceed fifty cents on \$100, but that in counties, cities and school districts the specified rates may be increased by a two-thirds vote for the purpose of erecting public buildings. Section 12 provides that "no county, city or town * * * shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters," etc. Held, that a town of less than 10,000 and more than 1,000 inhabitants could not by a two-thirds vote issue bonds and levy a tax exceeding fifty cents on a \$100, for the purpose of constructing water works and an electric light plant. *State ex rel. Robinson v. Town of Columbia*, 111 Mo. 365; 20 S. W. Rep. 90.

A city having power to subscribe for the stock of a railroad company and to issue its bonds in payment for the stock, is not precluded from doing so by the fact that it forms part of a township which has already subscribed for all the stock and issued all the bonds which it had the power to subscribe for or issue. *City of Iola v. Merriman*, 46 Kans. 49; 26 Pac. Rep. 485.

See, also, *Town of Winamac v. Huddleston*, 132 Ind. 217; 31 N. E. Rep. 561; *Salt Creek Township v. King Iron Bridge & Mfg. Co.*, 51 Kans. 520; 53 Pac. Rep. 303.

3. Bonds issued in violation of Constitution are void.—County bonds are invalid, even in the hands of bona fide purchasers, when issued without compliance with a constitutional requirement that provision shall be made, at the time of incurring any debt, for levying a sufficient tax to create a sinking fund of two per cent in addition to meeting the interest. *Quaker City Nat. Bank v. Nolan County*, 59 Fed. Rep. 660. To same effect: *Millraps v. City of Terrell*, (Ct. of App.) 60 Fed. Rep. 193.

The legislature of Michigan, which had no power to authorize a municipality to issue bonds in aid of a railroad, passed an act authorizing the electors of a village to vote an issue of bonds to make "public improvements" in the village, the money to be expended under the direction of the council "for the purpose aforesaid." The electors having duly voted in favor of the proposition, the council passed an ordinance declaring that a certain railroad was "a public improvement in the village," and directing the issuance and delivery of the bonds to an agent of the railroad company. Held, that the action of the council was unlawful, and the bonds were invalid. *Risley v. Village of Howell*, 57 Fed. Rep. 544.

The Laws of Ohio of 1880, page 157, which authorize a certain township to construct a few miles of railroad within its limits, intended to ultimately form part of a continuous line of road to be operated and equipped by private capital, violate the Constitution of Ohio, article 8, section 6, which prohibits the general assembly from authorizing any county, city, town or township to become a stockholder in any private corporation, or to raise money for or loan its credit in aid of such corporation; and bonds issued by a township for such a purpose are void. *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67; 11 Sup. Ct. Rep. 215, followed. *Aetna Life Ins. Co. v. Pleasant Township*, 53 Fed. Rep. 214.

4. Power to issue bonds—construction of statutory authority.—Under act of Texas, February 11, 1881, authorizing a county to issue bonds for a building for a court house, a county has no authority to issue bonds for the erection of a jail and court house combined, which is to be permanently used as a jail only, and to be used as a court house only until a separate court house shall be built. *Nolan County v. State*, 83 Tex. 182; 17 S. W. Rep. 823.

The statute of Massachusetts of 1855, chapter 394, which authorized a town to subscribe for shares in the capital stock of a railroad company, and to raise by loans or taxes the money required to pay the installments of the subscription, conferred on the town by implication the power to issue bonds. *Commonwealth v. Town of Williamstown*, 156 Mass. 70; 30 N. E. Rep. 472.

5. What is a "county purpose" for which bonds may be issued—improving navigation of river.—The purpose for which, under the act of June 11, 1891, entitled "An act to authorize Duval county to improve the navigation of the St. Johns river, and to issue bonds in aid thereof," the proceeds of the bonds are authorized to be applied is "the work of improving the navigation of the St. Johns river, and removing obstructions therefrom, within the county of Duval." This work is a county purpose, within the meaning of the provisions of section 5, article 9 of the Constitution, that the legislature shall authorize the several counties to assess and impose taxes for county purposes, although the river is a navigable stream and public highway, and may run hundreds of miles beyond the limits of the county, and through other counties, and commerce is carried on as an entirety upon it from its mouth towards its source for the distance stated, and thence back, and a large portion of its commerce is to or from other states and foreign countries, and the commerce and business of the river confined within the limits of the county are very small and of no importance. The statute is not in conflict with the constitutional provisions designated. *Stockton v. Powell*, 29 Fla. 1; 10 South. Rep. 688.

6. A beet sugar factory not an "internal improvement" for which bonds may be issued.—A beet sugar manufactory, which does not manufacture sugar from beets for toll, although propelled by water power, is not within the legislative control by virtue of any law of this state, and is, therefore, held not a work of "internal improvement," within the meaning of the Constitution or statute. *Getchell v. Benton*, 30 Neb. 870; 47 N. W. Rep. 468.

7. Authority to subscribe for stock and issue bonds therefor does not authorize a donation of bonds.—An act of Illinois of March 6, 1867, incorporating the Cairo and Vincennes Railroad Company, empowered municipal corporations, when authorized by popular vote, to subscribe for stock in the company, and issue bonds in payment therefor. A county agreed, by popular vote, to subscribe for \$100,000 of stock, and issue bonds therefor, but before issuance of the bonds the county authorities agreed to sell the stock back to the company in exchange for \$5,000 in bonds. In fact, only \$95,000 of bonds were issued and delivered to the company, and no stock received by the county. Held, that the bonds were void, since the transaction, being a gift and not a subscription, was not authorized by the statute nor assented to by the popular vote. *Choisser v. People ex rel. Rude*, 140 Ill. 21; 29 N. E.

Rep. 546. The act of February 9, 1869 (Priv. Laws 1869, p. 259), amending the charter of said railroad company, which attempts to validate all contracts between said company and municipalities, whereby the latter agreed to sell to the company at a nominal price the stock for which they had subscribed, has no effect, where the contract was made by the municipal authorities without being submitted to popular vote, as required by law, since the legislature cannot impose an obligation upon a municipality without its consent legally expressed. Ibid. This decision was followed in *Samson v. People ex rel. Rich*, 140 Ill. 466; 80 N. E. Rep. 689, and *Post v. Pulaski County*, 1 C. C. A. 405; 49 Fed. Rep. 628, where the facts were similar.

8. What amounts to a donation of bonds—sale of stock back to company for a nominal consideration in bonds.—The cases cited in the last section are distinguished in the following case, arising under the same laws, in which the facts were as follows: A city was duly authorized, by a vote of its inhabitants, to subscribe \$100,000 for stock in a railroad company, and to issue its bonds to an equal amount in payment thereof. Thereafter the city council passed a resolution binding the city to sell to the company all this stock for \$5,000, to be paid by a return of its bonds to that amount. The bonds were accordingly issued, and by direction of the council placed in escrow, to be delivered to the company when certain conditions were performed by it, the depositary being authorized and directed, after receipt of the stock, to sell the same to the railroad company for \$5,000 of the city bonds. There was nothing to show that the railroad company agreed to purchase the stock on the terms stated, or on any terms, but, after the stock and bonds were duly exchanged, the stock was sold in the manner proposed. It was held that this transaction did not convert the "subscription," which was authorized by the statute, into an unauthorized donation of \$95,000, and, if any wrong was done by the council in thus disposing of the stock, it did not vitiate the bonds in the hands of a bona fide purchaser. *City of Cairo v. Zane*, 149 U. S. 122; 13 Sup. Ct. Rep. 803.

9. Notice of election to vote upon the issue of bonds.—Under the County Government Act (Stat. Cal. 1883, p. 311, § 37), providing that when the supervisors wish to create a bonded indebtedness they shall "by order specify the particular purposes for which the indebtedness is to be created, and the amount of bonds which they propose to issue," and shall submit the question of the issue of the bonds to the "qualified electors" of the county, an order and proclamation of election, stating that there is to be submitted the question of the issue of \$75,000 of bonds for the construction of "two public wagon roads in said county, one from Bear Valley to Coulterville, and one from Mariposa to Yosemite," sufficiently specified the particular purpose for which the indebtedness is to be created. *People ex rel. Mariposa County v. Counts*, 89 Cal. 15; 26 Pac. Rep. 612. The fact that the order submits the question to "the people" does not invalidate it where the proclamation states that the question is to be submitted to the "vote of the people of this county," as it means the vote of only those people who are "qualified electors." Ibid.

The act of California of March 19, 1889, relative to the issuance of bonds for municipal improvements, provides (§ 3) that the board of trustees shall give notice of proposed improvements to the electors, stating "the

number and character of the bonds to be issued, the rate of interest to be paid, and the amount of levy to be made for the payment thereof." Held, that where the board passed and published ordinances determining that it was necessary to make certain municipal improvements, estimating the exact cost of each, and providing that each should be voted on separately, a notice of a special election, which specified the number and amount of bonds to be issued for each purpose, and the rate of interest, and stated that one-twentieth should be payable each year till all were paid, and that the tax levy for each year would be one-twentieth of the amount that might be voted, was sufficiently definite. *People v. Baker*, (Cal.) 23 Pac. Rep. 364, distinguished. *City of San Luis Obispo v. Haskin*, 91 Cal. 549; 27 Pac. Rep. 929.

Where a statute provides that the notice "shall specify what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off," the omission to specify in the published notice how much principal and interest would be paid annually renders the notice so defective as to afford cause for enjoining the municipal authorities, at the instance of taxpayers, from issuing or selling bonds based on an election, and the result thereof, held in pursuance of such defective notice, and from levying or collecting any taxes for paying the principal or interest of the same. *Mayor, etc., of City of Athens v. Hemerick*, 89 Ga. 674; 16 S. E. Rep. 72.

An ordinance providing for an election for the issue of city bonds required the city clerk to publish the election notice for "30 days next preceding said election," and to post the same "for the like period" at certain places. Held, that there was a substantial compliance with such requirement where the notice was posted twenty-six days before the election, and was published for thirty consecutive days, but not on the day preceding the election, it not being claimed that the omissions had any effect on the result. *Seymour v. City of Tacoma*, 6 Wash. 427; 33 Pac. Rep. 1059.

Where a notice was signed with the name of the town clerk without any official designation, and there was nothing to show that he was town clerk, it was held to be insufficient. *McVichie v. Town of Knight*, 82 Wis. 137; 51 N. W. Rep. 1094. Where the statute requires the notice to be not less than fifteen or "more than 20" days before the meeting, the notice was defective where it was given twenty-one days before the meeting. *Ibid.*

A County Court, in an order for an election on the question of the issue of county bonds in aid of a railroad, directed that notice of the election be given through a certain newspaper for five weeks. The period between the date of the order, February sixth, and the date of the election, March twelfth, excluding the former and including the latter day, according to the rule prescribed in the General Statutes of Missouri of 1866, page 84, section 6, lacked one day of five full weeks, but the notice was not prescribed by statute. Held, that the order should be construed so as to make, if possible, a valid election, i. e., as requiring advertisement in five weekly issues of the paper. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91; 13 Sup. Ct. Rep. 267.

The objection that the notice of election was defective is met by the fact that every legal voter of the township, except one, attended the election and cast his vote, and hence had knowledge of the time and place of the election.

Hutchinson & S. R. Co. v. Board of Commissioners, 48 Kans. 70; 28 Pac. Rep. 1078.

10. Proper notice must be affirmatively proved to sustain validity of bonds.—Where railroad aid bonds have been issued since the adoption of the Constitution of 1870, forbidding municipal aid to corporations, except in cases where such aid had been “authorized under existing laws by a vote of the people of such municipalities prior to adoption” of the Constitution, and there is no evidence that any notice was given of the special election called to vote upon the issuance of such bonds, the bonds must be held invalid, since the burden of proof in regard to such bonds is upon the party who asserts their validity. *Samson v. People ex rel. Rich*, 141 Ill. 17; 30 N. E. Rep. 781. To same effect: *Choisser v. People ex rel. Rude*, 140 Ill. 21; 29 N. E. Rep. 546.

11. Other matters pertaining to elections to vote upon the issue of bonds.—Where bonds are issued under the General Statutes of Kansas of 1889, paragraph 961, which declares that cities may “borrow money and issue bonds therefor” whenever “the city council shall be instructed so to do” by vote of the inhabitants, it is no objection to the validity of such bonds that the council submitted the matter to the electors by means of a resolution, rather than ordinance, where there is nothing in the statutes expressly requiring an ordinance in such case. *National Bank of Commerce v. Town of Granada*, 54 Fed. Rep. 100; 4 C. C. A. 212; 10 U. S. App. 692, distinguished. *City of Alma v. Guaranty Savings Bank*, (Ct. of App.) 60 Fed. Rep. 203.

The Laws of Colorado of 1887, page 445, section 1, provide that all town ordinances shall be recorded in a book kept for that purpose, and authenticated by the presiding officer of the board and the clerk, and all by-laws of a general or permanent nature shall be published in some newspaper, and such by-laws and ordinances shall not take effect until the expiration of five days after they are so published, but the book of ordinances provided for in the act shall be prima facie evidence of publication. Held, that an ordinance calling an election to authorize the funding of the floating debt of a town, which was passed, but not recorded or published, never went into effect, and that bonds authorized by such an election were void. 48 Fed. Rep. 278, affirmed. *National Bank of Commerce v. Town of Granada*, 4 C. C. A. 212; 54 Fed. Rep. 100.

A statute providing for an election as to the issue of bonds by a county directs that the returns of the election shall, within two days after the election, be delivered to the clerk of the Circuit Court, to be laid before the board of county commissioners, and that the board shall publicly canvass the returns at their “next regular or special meeting,” and declare the result. Held, that the purpose of the act in the use of the words quoted was to secure promptness of action upon the part of the board, rather than to exclude from any particular meeting the power to canvass the returns, and that a canvass of such returns made at an adjourned regular meeting held on a day subsequent to the election, to which day the regular meeting had been adjourned from a day prior to the election, was legal. *Stockton v. Powell*, 29 Fla. 1; 10 South. Rep. 688.

An election authorizing the issuance of school bonds is not invalid because the directors repeatedly called elections until the consent of the electors was

obtained ; and it cannot be objected that the directors finally intimidated the electors by threatening to continue to call elections until the issuance of the bonds was authorized, when such threats were only alleged inferentially. *Luzader v. Sargeant*, 4 Wash. 299 ; 30 Pac. Rep. 142.

Various questions in regard to elections for the issue of bonds arising under local and particular statutes are passed upon in the following cases: *Gavin v. City of Atlanta*, 86 Ga. 132; 12 S. E. Rep. 262; *Kansas City & Pac. R. Co. v. Rich Township*, 45 Kans. 275; 25 Pac. Rep. 595; *Chicago, K. & W. R. Co. v. Township of Ozark*, 46 Kans. 415; 26 Pac. Rep. 710; *Salt Creek Township v. King Iron Bridge & Mfg. Co.*, 51 Kans. 520; 33 Pac. Rep. 303; *State ex rel. Board of Education v. Benton*, 29 Neb. 460; 45 N. W. Rep. 794; *Lynchburg & D. R. Co. v. Person County*, 109 N. C. 159; 13 S. E. Rep. 783; *Luzader v. Sargeant*, 4 Wash. 299; 30 Pac. Rep. 142; *Brown v. Town of Point Pleasant*, 36 W. Va. 290; 15 S. E. Rep. 209.

12. Compliance with statutes as to what bonds must show.— A charter provision, requiring all municipal bonds to specify the purpose for which they are issued, is not complied with so as to cut off equitable defenses, as against an innocent holder, by a negotiable bond which merely gives the date of the ordinance authorizing its issuance, without stating the contents or title thereof. Mr. Justice Brewer, dissenting. *State v. School Dist.*, 34 Kans. 237; 8 Pac. Rep. 208, and *Young v. Camden Co.*, 19 Mo. 309, distinguished. *Barrett v. City of Dennison*, 145 U. S. 135; 12 Sup. Ct. Rep. 819.

Bonds purporting to be "refunding bonds" issued to take up former bonds "falling due" sufficiently comply with the Michigan statute requiring each municipal bond to show upon its face "the class of indebtedness to which it belongs, and from what fund it is payable." How. Ann. St. § 2717; *Barnett v. Denison*, 145 U. S. 135; 12 Sup. Ct. Rep. 819, distinguished. *City of Cadillac v. Woonsocket Institution for Savings*, 7 C. C. A. 574; 58 Fed. Rep. 935.

13. Bonds must conform to statute as to time of payment.— An act of Mississippi, March 25, 1871, authorized certain counties, cities and towns to aid in the construction of a certain railroad by subscribing for stock of the company, and provided, in section 4, that the supervisors of such counties might issue bonds payable at such times as they might deem best, but "not to extend beyond ten years from the date of issuance," for such sums as might be necessary to meet the subscriptions. Section 5 authorized the towns to issue bonds for the same purpose, "in the same manner, and with the like effect," and provided that all bonds so issued "shall be alike binding upon the towns respectively in their corporate capacity, as the bonds so issued by the said boards of supervisors shall be binding upon the counties respectively." Held, that bonds issued by towns, having longer than ten years to run, are void, for the limitation contained in section 4 is made a part of section 5. *Barnum v. Town of Okolona*, 148 U. S. 393; 13 Sup. Ct. Rep. 638.

14. Railroad company must comply with conditions precedent before being entitled to bonds voted in its favor.— A special law empowering a municipal corporation to issue its bonds in aid of the construction of a railroad provided for a popular vote upon the proposition to issue bonds; that the proposal to be voted on should designate the period within which the road must be built in order to entitle it to the benefit of the

bonds; that the bonds when voted should be delivered "in escrow" to designated persons as commissioners, to be by them delivered to the railroad company upon full and complete compliance with the terms of the act; and that if the company should fail to comply with such conditions it should be the duty of such commissioners to forthwith return the bonds to the city council. Such a proposal, fixing the first of November as the time within which a railroad should be completed into the city ready for operation, was submitted to the people, and the vote was in favor of issuing the bonds. The road was not completed before the fifteenth of November. Held, that by the terms of the law and of the contract, the completion of the road by the time specified was a condition precedent, and that by reason of its failure to comply therewith the railroad company did not become entitled to the bonds. *McManus v. Duluth, C. & N. R. Co.*, 51 Minn. 80; 52 N. W. Rep. 980. It was also held in the same case that the statute did not give to the bond commissioners the power of determining conclusively the fact as to whether the conditions upon which the bonds were voted had been complied with. See, also, *Brickridge County v. McCracken*, (Ct. of App.) 61 Fed. Rep. 191; *Clark v. Town of Rosendale*, 70 Miss. 542; 12 S. W. Rep. 600; *Township of Midland v. Gage County*, 37 Neb. 582; 56 N. W. Rep. 817.

15. Effect of false representations to voters to vitiate election.—A proposition to vote bonds in aid of the construction of a railroad, when accepted, is in the nature of a contract, and if the electors, through false or fraudulent representations of the officers of the donee, have been induced to vote such aid, a court of equity in a proper case will relieve as against such bonds. *Nash v. Baker*, 37 Neb. 713; 56 N. W. Rep. 376. To same effect: *Wullenwaker v. Dunnigan*, 30 Neb. 877; 47 N. W. Rep. 420; S. C., on rehearing, 33 Neb. 477; 50 N. W. Rep. 428.

16. Estoppel — recitals — bona fide holders.—County bonds bore on their face recitals that they were issued to a certain railway corporation in payment of a subscription for stock, made by virtue of a certain act of the state legislature (cited by title and date) and acts amendatory thereof; "the provisions and requirements of said acts, and the conditions precedent necessary to the subscription aforesaid, and the lawful issue of this bond, having been in all respects fully and completely complied with and performed." Held, that the defense of ultra vires was not available in an action on the bonds, as against a bona fide purchaser for value on the faith of the recitals, and without notice that the corporation was authorized to construct only a narrow-gauge road, and that the bonds were issued on condition that the road should be, as it in fact was, of standard gauge. *Board of Commissioners of Kingman County v. Cornell University*, 6 C. C. A. 296; 57 Fed. Rep. 149.

Under Howard's Statutes of Michigan, sections 5104, 5105, which authorize the school district board to issue bonds only in specified instances and on a vote of the school district, the question whether the proceedings to vote bonds are such as will authorize the board to issue them is one of fact, to be determined by the board, and hence a recital in a bond, signed by two of the three members of the board, that the bond is issued pursuant to a vote of the qualified electors at a special school meeting, held at a designated date and place in

accordance with law, is sufficient evidence of the legality of the issue to protect a bona fide purchaser, though the records of the board do not show its authority to issue the bond. *Gibbs v. School District No. 10*, 88 Mich. 334; 50 N. W. Rep. 294.

Though a county, in issuing bonds for the erection of a building to be temporarily used as a court house until a projected permanent court house is erected, exceeds the power conferred by act of February 11, 1881, authorizing it to issue bonds for the erection of a court house, yet, if, at the time the bonds are issued, the county has no court house, and the bonds recite that they are issued for the purpose of erecting one, and contain no recitals showing want of authority to issue them, the county will be estopped, as against a bona fide purchaser, to set up that they were not issued for such purpose. *Nolan County v. State*, 83 Tex. 182; 17 S. W. Rep. 823.

Refunding bonds, payable to bearer, recited that they were issued by the board of supervisors in conformity with the provision of an act authorizing the county to issue such bonds and provide for the retirement of outstanding bonds. Held, that the purchaser was not bound, in the face of the recitals borne by the bonds, to investigate the nature of the refunded indebtedness. *Ashley v. Presque Isle County*, (Ct. of App.) 60 Fed. Rep. 55.

Recitals in county bonds signed and issued by officers not authorized to issue them are not binding upon the county. *Brown v. Bon Homme County*, 1 S. D. 216; 46 N. W. Rep. 173.

Under Compiled Laws of Kansas, 1885, chapter 19, article 1, section 5, which declares that the powers granted to cities of the second class "shall be exercised by the mayor and common council of such cities," and article 7, section 111, which directs that funding bonds shall be duly issued only after an ordinance therefor shall be duly passed, funding bonds signed by the mayor of such a city, and attested by the city clerk, under the city seal, without any ordinance or resolution of the mayor and council, are void, and a recital in such bonds, to the effect that all the requirements of the statutes have been strictly complied with in issuing them, does not estop the city from denying their validity. *Swan v. City of Arkansas City*, 61 Fed. Rep. 478.

A county railway aid bond reciting that it was issued "in pursuance of an election by the taxable inhabitants of C. does not estop the county from showing that a "majority of the taxable inhabitants" of the district authorized to vote the bonds did not assent to the issue. *Deland v. Platte County*, 54 Fed. Rep. 823.

A recital in county bonds that they are issued "pursuant to an order of the County Court" puts all persons dealing in the bonds upon inquiry as to the terms of the order. *Post v. Pulaski County*, 1 C. C. A. 405; 49 Fed. Rep. 628. Where bonds are issued under an ordinance which is invalid on its face and the bonds refer to the ordinance, the reference is notice of the provisions of the ordinance, and of its invalidity, and the bonds were void, even in the hands of innocent purchasers. *Risley v. Village of Howell*, 57 Fed. Rep. 544.

A recital in bonds that they are issued under a town ordinance does not estop the town from showing that the ordinance was never published, and is, therefore, void, where neither the mayor nor clerk, who signed the bonds, have any duty in relation to publishing ordinances, or determining when they have been

published according to law. 48 Fed. Rep. 278, and 44 Fed. Rep. 262, affirmed. *Dixon Co. v. Field*, 4 Sup. Ct. Rep. 315; 111 U. S. 83, followed. *National Bank of Commerce v. Town of Granada*, 4 C. C. A. 212; 54 Fed. Rep. 100.

When the laws or constitutional provisions relating to the issuance of county bonds point to the county records as evidence of facts required to authorize their issuance, such records, and not the recitals in the bonds, must be looked to by all persons proposing to deal in them. *Quaker City National Bank v. Nolan County*, 59 Fed. Rep. 660.

Municipalities are not estopped by recitals in their bonds, except as to matters of fact, nor even then if the facts recited are matters of public record, open to the inspection of every inquirer. *Sutliff v. Commissioners*, 147 U. S. 230; 13 Sup. Ct. Rep. 318, followed. *Coffin v. Kearney County*, 6 C. C. A. 288; 57 Fed. Rep. 137.

In an action by an innocent purchaser against a township on railway aid bonds, which on their face refer to the act authorizing their issuance and specifically recite the taking of each step required thereby, the township is estopped to allege invalidity of the bonds on any ground except that they were issued in violation of some constitutional or statutory requirement. *Township of Washington v. Coler*, 2 C. C. A. 272; 51 Fed. Rep. 362. As to who is a bona fide holder, see *Lytle v. Town of Lansing*, 147 U. S. 59; 18 Sup. Ct. Rep. 254.

Recitals in bonds issued by a city council under statutory authority, that they are "refunding" bonds, issued to take up "old bonds falling due," estop the city from showing, as against bona fide holders, that the old bonds were invalid, and, therefore, insufficient to support the issuance of the new ones. *City of Cadillac v. Woonsocket Institution for Savings*, 7 C. C. A. 574; 58 Fed. Rep. 935.

A purchaser of municipal bonds is bound to ascertain whether the municipality has power to issue them, and an utter want of such power is not cured by any recitals in the bonds. *Dixon Co. v. Field*, 111 U. S. 83; 4 Sup. Ct. Rep. 315, followed. *Coffin v. Kearney County*, 6 C. C. A. 288; 57 Fed. Rep. 137.

17. Estoppel of county by recitals in its records.—A municipal township of Kansas, that voted bonds to aid in the construction of a railroad on an agreed line through the township, and made a subscription to the capital stock of the company, and received and retains the certificates of stock issued to it, the proceedings of the board of county commissioners affirmatively showing that all the requirements of the statute authorizing such vote and empowering such subscription had been duly observed, the railroad having been constructed through the township in all respects in strict compliance with the terms of the subscription, and being regularly operated, in an action of mandamus to compel the issue and delivery of the bonds voted, is estopped from asserting that the petition presented to the board of county commissioners, requesting an election to be called at which to vote the bonds, was not signed by two-fifths of the resident taxpayers of the township, the board of county commissioners having found and determined at the time of its presentation that it was so signed, and was legal in all other respects, and the railroad having been constructed through the township on the faith that all the statutory

requirements had been complied with, as shown by the journal of the county board. *Hutchinson & S. R. Co. v. Board of Commissioners*, 48 Kans. 70; 28 Pac. Rep. 1078.

18. Recital of authority under which bonds are issued not conclusive on bondholder.—A recital on the face of county bonds that they are “issued under and pursuant to order of the County Court * * * for subscription to the stock of the M. & M. R. R. Co., as authorized by an act * * * entitled ‘An act to incorporate the M. & M. R. R. Co., approved February 20, 1865,’” although it may estop the county in favor of the bondholder, is not conclusive in favor of the county, and the bondholder may introduce evidence to prove that the bonds were issued under authority of another statute. 37 Fed. Rep. 75, affirmed. *Knox County v. Ninth National Bank*, 147 U. S. 91; 13 Sup. Ct. Rep. 267. Of similar purport is the case of *Lewis v. City of Port Angeles*, 7 Wash. 190; 34 Pac. Rep. 914, where it was held that a recital in an ordinance submitting a proposition to bond the city for the establishment of an electric lighting plant, that said ordinance was passed in pursuance of a certain act, is mere surplusage; and where the act recited is no longer in force, but is substantially re-enacted by the repealing act under which the ordinance must in fact have been adopted, there is no ground for an injunction on the bonds’ issue.

19. Whether bonds voted to one railroad company can be claimed by its grantee and successor.—The electors of Midland township, in Gage county, by a vote authorized the supervisors of said county to issue and deliver the bonds of said township to a railroad company designated, upon the construction by it of a certain railroad. The railroad company named as donee failed to build the road, sold out its property and franchises, and its vendee built the improvement and claimed the bonds. Held, that the electors of the township were entitled to stand upon the very letter of their promise; that the supervisors of the county were special agents of the electors of the township, with limited powers, and would be enjoined, at the suit of the township, from delivering the bonds to the vendee of the company named as donee in the election proceedings. *Township of Midland v. Gage County*, 37 Neb. 582; 56 N. W. Rep. 817. Bonds were voted in aid of the O. H. and G. Railroad Company, which afterwards transferred all its property and franchises to the H. and S. Railroad Company. Held, that the latter company succeeded to the right to the bonds, and could compel their issue. *Hutchinson & S. R. Co. v. Board of Commissioners*, 48 Kans. 70; 28 Pac. Rep. 1078.

20. Excessive issue of bonds — rights of holders.—Bonds were issued by a county to a railroad company in excess of the amount authorized. When the last issue was made, \$25,150 was due from the county, and 185 bonds for \$500 each were then issued. Held, that the \$25,150 due at the last issue was to be divided pro rata between the holders of the bonds then issued. *Gillim v. Daviess County*, (Ky.) 14 S. W. Rep. 838 (not officially reported).

Where bonds are issued by a County Court at different times, to pay for improvements, under an act limiting the total amount to be issued, the fact that bonds are issued beyond the limit does not invalidate such bonds as were issued and sold before the limit was reached. *Catron v. LaFayette County*, 106 Mo. 659; 17 S. W. Rep. 577. In an action on bonds issued by a county

under an act limiting the total amount to be issued, the amount sued on being less than the limitation, the petition need not allege that there was not an over-issue, it being a matter of defense if there was. *Ibid.*

21. Miscellaneous cases.—Unauthorized delivery.—Where a village council, under the statute authorizing the issuance of water works bonds, authorizes the president and clerk to sign the bonds, but gives no authority to deliver them, a delivery by the president confers on the holder no right to enforce payment. *Portsmouth Savings Bank v. Village of Ashley*, 91 Mich. 670; 52 N. W. Rep. 74.

Officers may issue less than amount of bonds authorized.—When authority is given to the officers of a public corporation by an election or otherwise to issue a certain amount of the bonds of the corporation, the officers will have the power and the right, whenever there is a sufficient reason therefor, to issue a less amount of the bonds of the corporation. *Chicago, K. & W. R. Co. v. Township of Ozark*, 46 Kans. 415; 26 Pac. Rep. 710.

Impairing obligation of contract by subsequent statutes affecting payment of bonds.—The rights of investors in state bonds become vested under the laws for raising revenue to pay principal and interest existing at the time the bonds are issued, and the obligation of the contract is impaired by subsequent laws which unduly restrict their rights to compel payment. *In re Copenhaver*, 54 Fed. Rep. 660. See, also, *United States ex rel. Davis v. Knox County*, 51 Fed. Rep. 880.

Compelling levy of taxes to pay bonds.—The act of Indiana of March 11, 1867, authorized corporated towns to raise money by issuing bonds, and to levy an annual tax in addition to the levy for general purposes, not exceeding fifty cents on each \$100 worth of taxable property and one dollar on each poll, to pay for the same. The act of June 11, 1852, authorized town trustees to levy an annual tax for general purposes, not exceeding fifty cents on each \$100 of taxable property and twenty-five cents on each poll. The act of 1852, section 30, provides that town trustees shall levy a tax "to such an amount as they may deem necessary." Held, that a town which had levied and properly applied the full amount of taxes authorized by the first two statutes aforesaid could not be compelled to make any additional levy to pay a judgment recovered for interest on bonds issued under the first act. *United States ex rel. Spitzer v. Town of Cicero*, 1 C. C. A. 499; 50 Fed. Rep. 147. See, further, *People ex rel. Rinard v. Town of Mt. Morris*, 137 Ill. 576; 27 N. E. Rep. 757; *State ex rel. Hudson v. Trammel*, 106 Mo. 510; 17 S. W. Rep. 502; *Chicago, St. P., M. & O. R. Co. v. Cuming County*, 31 Neb. 374; 47 N. W. Rep. 1121; *United States ex rel. Jones v. County Court of Macon County*, 144 U. S. 568; 12 Sup. Ct. Rep. 921.

Whether bonds constitute a part of the general indebtedness of city issuing them.—The charter of Seattle, article 8, section 8, authorizes the city council to issue local improvement bonds, and section 9 provides that they shall be paid for by the city from the proceeds of the assessments, in the improvement districts, "but the city shall be liable for the payment of both principal and interest." Held, that such bonds, when issued, will constitute part of the city's general and primary indebtedness, and an ordinance attempting to make it liable only in the event of a failure to collect the assessments is invalid; and

the bonds cannot be issued when the amount would increase the debt of said city in violation of the Constitution of Washington, article 8, section 6, forbidding any city to become indebted to an amount exceeding one and a half per cent of its taxable property, except by the consent of three-fifths of its voters. *Austin v. City of Seattle*, 2 Wash. 667; 27 Pac. Rep. 557.

Res adjudicata.—Five persons, as taxpayers, on behalf of themselves and all other taxpayers of M., obtain an injunction to restrain the issue and sale of municipal bonds on account of their legal invalidity, the defendants being the mayor and the clerk of the city authorized by such ordinance to sign and countersign and seal such bonds, and deliver them to commissioners authorized by the ordinance to receive and sell the same. Such injunction is dissolved. Afterwards two of these plaintiffs, as taxpayers, obtain an injunction to restrain collection of taxes to pay interest on such bonds on account of their legal invalidity, the defendants being the city and its marshal. There is sufficient identity of parties here to justify the application of the defense of *res judicata*. *Gallagher v. City of Moundsville*, 34 W. Va. 730; 12 S. E. Rep. 859.

PHILLIPS V. CITY OF DENVER.

(Supreme Court of Colorado, November 22, 1893.)

1. MUNICIPAL CORPORATIONS. POWERS. ORDINANCES. A municipal corporation can exercise only such powers as are granted to it by its charter or by the general law of the state, either in express words or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation. A municipal corporation, under a general grant of authority, cannot adopt ordinances which infringe the spirit or are repugnant to the policy of the state, as declared in its legislation.

2. VALIDITY OF ORDINANCES. REASONABLENESS. An ordinance expressly authorized by specific and definite legislative authority will be upheld, unless it conflicts with the Constitution of the state or nation; but an ordinance which the municipality assumes to pass by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair and impartial, and not arbitrary or oppressive.

3. LIVERY STABLE NOT A NUISANCE PER SE. A livery stable in a town or city is not per se a nuisance, though it may become a nuisance, if not constructed, kept and used in a proper manner.

4. ORDINANCE AS TO LIVERY STABLES DECLARED UNREASONABLE. An ordinance prohibiting the location of a livery stable in any block in which a school building is situated, or in any block which is opposite to a block in which a school building is situated, without reference to the manner in which such stable is constructed, kept or used, and without further specifying the distance, cannot be regarded as reasonable, and so cannot be upheld as valid, under a general or incidental grant of authority to the municipality assuming to pass it.

ACTION for violation of city ordinance. On the trial, judgment was rendered as follows: "That said defendant be fined in the sum of ten dollars and costs, and in default of the payment of the same, that the said defendant be imprisoned in the city jail of the city of Denver until said fine is fully satisfied, not to exceed five days." Defendant brings the cause to this court by writ of error. This action was tried in the County Court upon an agreed statement of facts as follows: "That this action was originally brought before S. D. Barnes, Esq., police magistrate of the city of Denver, to recover a fine and costs for the violation of an ordinance, No. 8, of the series of 1888, and entitled 'A bill for an ordinance to amend section 46, of ordinance No. 23, of the Ordinances of the City of Denver, of the series of 1885, entitled 'Public Health,' signed and approved July 11, 1885, and also known as section 1, art. 7, c. 10, of the Laws and Ordinances of the City of Denver, published by authority in 1886, which ordinance is as follows: 'Be it enacted by the city council of the city of Denver, that said section 46, of ordinance No. 23, of the Ordinances of the City of Denver, of the series of 1885, be amended so as to read as follows: 'Sec. 46. No candle factory, rendering establishment, soap factory, livery stable or stable for the boarding of horses, shall be erected, established or carried on in any block in this city (unless the same shall be in operation at the date of the passage of this article) without a permit from the city council. The city council shall not grant a permit for the erection or carrying on of either or any of the above-mentioned establishments or vocations in any block in the city of Denver when a majority of the owners of the lots composing any such block shall protest, in writing, against the erection, establishment or carrying on of the same therein. No permit shall be issued by the city council for any candle factory, rendering establishment or soap factory to be erected, carried on or conducted within 500 feet of any school building in the city of Denver, nor for any livery stable in any block in which a school building is situated, or in any block which is opposite to a block in which a school building is situated.'" It is agreed that the penalty of this amended ordinance is as follows: Section 6, art. 9, c. 10, of the Laws and Ordinances of the City of Denver, Colo., 1886, provides: 'That any person or

persons guilty of a violation of any of the foregoing provisions of this chapter, where a penalty is not fixed for such violation, shall, upon conviction, be fined for each and every offense in a sum not less than \$10 nor more than \$100.' That upon the trial of said case in said police court the only testimony that was offered on the part of the city was that said livery stable was carried on within 500 feet of a school building, and that the said block in which the said livery stable was conducted was opposite to a block in which a school building was situated. That judgment was rendered against said defendant, from which defendant prayed an appeal to the County Court. It is conceded that said defendant occupied and conducted a livery stable within the limits prohibited by the ordinance, which was erected and put in operation after the 18th day of February, 1888, and that at the time of, and prior to, the commencement of this action, the defendant was engaged in running a livery stable, or stable for the boarding of horses. There being no dispute as to the facts, the only question presented in the court for consideration is whether the ordinance or regulations regularly adopted and enacted by the city council of the city of Denver is valid."

Charles M. Campbell, for plaintiff in error. *John F. Shafroth*, *Greeley W. Whitford* and *A. B. Seaman*, for defendant in error.

ELLIOTT, J. (*after stating the facts*). The assignments of error challenge the validity of the ordinance under which defendant was convicted. Among other things, the ordinance provides that no livery stable, or stable for the boarding of horses, shall be erected, established or carried on in any block in this city (unless the same shall be in operation at the date of the passage of the ordinance) without a permit from the city council, and that no permit shall be issued for any livery stable in any block in which a school building is situated, or in any block opposite to a block in which a school building is situated. It is conceded that defendant occupied, conducted and was engaged in running a livery stable for the boarding of horses within the limits prohibited by the ordinance at the time of, and prior to, the commencement of this action, and that the stable was erected and put in operation after the adoption of the ordinance, February 18, 1888.

1. In the case of *City of Durango v. Reinsberg*, 16 Col. 327; 26 Pac. Rep. 820, this court declared the law as follows in respect to the powers of municipal corporations: "A municipal corporation can exercise only such powers as are granted to it by its charter, or by the general law of the state, either in express words or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation. A municipal corporation, under a general grant of authority, cannot adopt ordinances which infringe the spirit or are repugnant to the policy of the state, as declared in its legislation."

2. In this case the question arises, what kind of legislative authority was there, if any, for the enactment of the ordinance under which defendant was convicted? In determining this question the following distinction is to be observed: An ordinance expressly authorized by specific and definite legislative authority will be upheld, unless it conflicts with the Constitution of the state or nation, while an ordinance which the municipality assumes to pass by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair and impartial, and not arbitrary or oppressive. 1 Dill. Mun. Corp. (4th ed.) §§ 319-322, 327 et seq.; *Tugman v. City of Chicago*, 78 Ill. 405; *May v. People*, 1 Col. App. 157; 27 Pac. Rep. 1010. The following provisions of the charter of the city of Denver were in force at the time of the adoption of the ordinance in question, and they are now relied on to sustain its validity: "Sec. 20. The city council shall have power by ordinance: * * * Eleventh. Exclusively to license, regulate, and tax any or all lawful occupations, business places, amusements, places of amusement, and may fix the rate of charges for the carriage of persons and property within the city, by licensed hackmen, omnibusmen, carriagemen, draymen and expressmen. * * * Fifty-eighth. To regulate or prevent the carrying on of any business which may be dangerous or detrimental to public health, or the manufacture or vending of articles obnoxious to the health of the inhabitants; and to declare, prevent or abate nuisances on public or private property and the cause thereof." See Sess. Laws, 1885, pp. 81, 82, 87. The following provision of the charter was passed after the adoption of the ordinance in

question: "The city council shall have the power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, and to make all ordinances which it may deem necessary or requisite for the good order, health, good government and general welfare of the city." See Sess. Laws, 1889, p. 129 (amendment to section 21 of the charter of 1885). By virtue of the foregoing provisions, it is contended that the city council were authorized to control absolutely the location and carrying on of livery stables within the limits of the city; that, by virtue of the power to regulate and prevent, they might prescribe the limits for such stables, at their discretion, and prohibit their being conducted elsewhere; and that they might declare and abate livery stables as nuisances, if carried on within such interdicted limits, or visit upon the proprietors such penalties as would compel them to yield obedience to any ordinance the council might deem proper to exact upon such subject. In our opinion the charter provisions above quoted will not bear the construction contended for. The power conferred is not sufficiently express, specific or definite to warrant such unrestrained municipal legislation affecting private property. The grant of power to regulate lawful occupations and business places is certainly not an express grant of power to locate or prescribe the limits of carrying on lawful occupations upon private premises. The grant of power to regulate and prevent the carrying on of business dangerous or detrimental to public health, and to declare, prevent or abate nuisances, is not to be construed as vesting the city council with authority to prohibit, at their discretion, the existence of well-constructed, well-regulated and well-conducted livery stables. Neither does the "general welfare" clause, adopted after the passage of the ordinance in question, confer full and specific power upon the city council for that purpose. The ordinance in question must, therefore, be subjected to the test of reasonableness; and the particular provision under consideration cannot stand, in any event, unless its adoption was a reasonable exercise of the incidental or general grants of power contained in the charter. Whether the city government can be vested with such authority as is contended for need not now be considered. *Everett v. City of Council Bluffs*, 46 Iowa, 66.

3. A livery stable in a town or city is not per se a nuisance, though it may become a nuisance, if not constructed, kept and used in a proper manner. *Flint v. Russell*, 5 Dill. 151; *Kirkman v. Handy*, 11 Humph. 406. The ordinance in question is not directed against livery stables improperly kept or used, but against all livery stables within the prescribed limits. There is nothing to indicate that there was anything improper in the construction, keeping or use of defendant's stable. The sole contention on the part of the city, therefore, is confined to the single fact that defendant had located and conducted his stable within the limits prohibited by the ordinance; that is, in a block opposite to a block in which a school building was situated. The ordinance, however, does not undertake to declare that a livery stable conducted within the interdicted limits shall be deemed a nuisance per se, nor do we intimate that such an ordinance would have been valid if passed., *City of Denver v. Mullen*, 7 Col. 345; 3 Pac. Rep. 693; *State v. Mott*, 61 Md. 297.

4. It is true there was testimony showing that defendant occupied and carried on a livery stable within 500 feet of a school building, and also that said livery stable was in a block opposite to a block in which a school building was situated. But the ordinance does not provide that livery stables shall not be located or conducted within 500 feet of any school building, nor is any other distance prescribed. The 500-foot limit applies only to candle factories, rendering establishments and soap factories. In respect to livery stables, the language is, "that no permit shall be issued * * * for any livery stable in any block in which a school building is situated, or in any block which is opposite to a block in which a school building is situated." The record in this cause does not show the size or dimensions of blocks in the city of Denver, nor does it show that the blocks are of uniform dimensions. There is, therefore, no definite distance from school buildings within which the construction and carrying on of livery stables are prohibited by the ordinance. For illustration, suppose the city is laid out into blocks of uniform dimensions, intersected by streets and alleys at right angles. In such case, if a school building were located on an interior block, livery stables would, by the ordinance, be excluded from five blocks; and if the blocks were 400 feet in length by 266 feet in width and the streets 80 feet wide, a school

building might be so situated as to exclude the location of a livery stable nearly 1,000 feet distant from it—that is, the diagonal length of two blocks, and the width of the intervening street. On the other hand, a stable might be located only a little more than 100 feet from a school building—that is, on the corner diagonally across from it—and yet not be in the same block, nor in any block directly opposite thereto. More than this, the stable located at the greater distance would face from, and be out of sight of, the school building, while the nearer stable would be in full view of it; and yet the location of the further stable would be contrary to the ordinance, while the nearer stable would not be. If it be considered that the ordinance applies to blocks diagonally opposite to a school building, its operation is in some respects still more objectionable, for in such case livery stables would be excluded for nine blocks from every school building situated in the interior of the city. Even the foregoing illustration does not fully show the unreasonableness of the ordinance in question. There is nothing in the record to show that the blocks of the city are of uniform size. Some may be larger than above supposed, and some may be twice or three times as large, as in case where the usual intersecting street or streets have not been cut through. An ordinance so uncertain, so indefinite, so unsuitable and unsatisfactory to accomplish the desired object, cannot be regarded as reasonable, and so cannot be upheld under the authority supposed to be granted by the city charter. Ordinances of the kind in question, though not strictly criminal, are highly penal, and cannot, unless free from legal and constitutional objection, be permitted to prejudice the rights and privileges of the citizen in respect to the use and enjoyment of his private property. The judgment of the County Court is reversed, and the cause remanded.*

Municipal corporations—regulation of livery stables—reasonableness and validity of ordinance.—Compare with the principal case *City of St. Louis v. Russell*, 7 Am. R. R. & Corp. Rep. 759, and note.

* Reported in 84 Pac. Rep. 902.

ABBOTT ET UX. V. INTERNATIONAL BLDG. & LOAN ASSN. ET AL.

(Supreme Court of Texas, March 8, 1894.)

1. BUILDING AND LOAN ASSOCIATIONS. PREMIUM. USURY. A note given to a building and loan association for a loan of \$1,440 provided for the payment of \$2,600 (the \$1,160 being premium for the privilege of borrowing) on or before the maturity of certain shares in the association, which could not be more than 200 months thereafter, with interest at six per cent till paid. The by-laws of the association (made a part of the note) provided that it might be satisfied at any time by paying the amount of the loan, and, in addition to the interest already paid, one-eighth of the entire premium for each year that the borrower had had the money. Held, that it was usurious, as providing for more than twelve per cent interest per annum.

2. Being usurious, the borrower was entitled to have all moneys paid by him on the note, credited upon the principal.

3. CORRECTING MISTAKE IN CONTRACT. A contract providing for the payment of twenty-six dollars per month on thirteen shares in a building and loan association, "as provided for in the by-laws of the association," which are made a part of the contract, furnishes the evidence of a mutual mistake—the by-laws providing only for a payment of one dollar per month on each share—which may be corrected.

Upson & Bergstrom, for plaintiffs in error. *B. L. Aycock*, for defendants in error.

BROWN, J. About January, 1884, Thomas H. Abbott subscribed for seven shares of the first series of stock in the International Building and Loan Association, and in 1886 he subscribed for six shares in the fifth series of the stock in said association, the shares being \$100 each. On the 16th day of April, 1886, Abbott borrowed from the association \$1,440, for which he gave the following note, joined by his wife: "2,600.00. San Antonio, Texas, April 12, 1886. On or before the maturity of the first and fifth series of stock of the International Building and Loan Association, we promise to pay to the order of the International Building and Loan Association, at its principal office in San Antonio, Texas, the sum of twenty-six hundred dollars (\$2,600), with interest at the rate of six per cent per annum from the date hereof until paid; also, the further sum of twenty-six dollars (\$26.00) per month from this date until maturity of the aforesaid stock as provided for in the by-laws of said association, which by-laws are made and taken to be a part hereof." To secure the

payment of the above note, Abbott and wife executed and delivered to William Holland a deed of trust conveying to him the property described in the petition, which deed contained the usual provisions for sale in case of failure to pay principal, interest or monthly payments on stock. The interest was to be paid monthly, and one dollar on each share of stock to be paid each month. Abbott paid the monthly installments on his shares of stock up to and including November, 1890, and paid the interest on the note for the same time, amounting to the sum of \$715, when he refused to pay any more. In June, 1891, Holland advertised the property for sale, and Abbott sued out an injunction to restrain the sale. Defendant answered, setting up the note and deed of trust, and alleging the failure and refusal of Abbott to pay the interest and monthly installments on the note, praying that the deed of trust be foreclosed, and the property sold to pay the debt. Defendant also alleged that the sum of twenty-six dollars, to be paid each month, was inserted in the note by mutual mistake, and should have been thirteen dollars. The court found this to have been a mistake. The District Court gave judgment for the International Building and Loan Association against Thomas H. Abbott for \$743.85, foreclosing the deed of trust, and ordering the land to be sold. The shares of stock pledged were by the court canceled. This judgment was affirmed by the Court of Civil Appeals.

Plaintiff in error complains of the ruling of the court in holding that the mistake committed by inserting twenty-six dollars for thirteen dollars in the note could be corrected, because it was not shown to be a mutual mistake. The note expressly made the by-laws a part of it. These by-laws prescribed that a shareholder should pay one dollar per month on each share of stock, and, there being thirteen shares, would make thirteen dollars per month to be paid. This showed of itself that there was a mistake in inserting more than the by-laws allowed, and was properly corrected. The contract furnished within itself the evidence of the mistake.

Abbott claims that the note is usurious, and that he is entitled, under the law, to have all money paid as interest credited on the principal, and the balance of the principal settled out of the value of his matured stock. He also prays for a recovery of his six shares of stock in the possession of the defendant. The by-laws of defendant association required that each stockholder should,

for each month, pay one dollar upon each share of stock owned by him, until such share should be of the value of \$200, when the stock should be matured, and surrendered to the association, the stockholder receiving the sum of \$200 for each share, less any amount in which he might be indebted to the association. If a shareholder borrowed money from the association, he was required to transfer and deliver his shares of stock to it, to be held until they matured under the by-laws, when the debt would become due, the stock canceled, and the sum due to the shareholder upon the shares applied to the payment of the debt. If a shareholder who borrowed desired to pay off the debt and redeem his stock before the time that it matured, he could do so by paying the debt, and, in addition to the interest already paid, pay the one-eighth part of the premium for each year that he had the use of the money. The premium bid for the privilege of borrowing was a disguise for unlawful interest, and in fact was a sum to be paid for the use of money in addition to the specified rate of interest; and, if the rate charged as interest and the premium amounted to more than twelve per cent per annum, the contract is usurious. *Jackson v. Cassidy*, 68 Tex. 287; 4 S. W. Rep. 541; *Association v. Lane*, 81 Tex. 369; 17 S. W. Rep. 77; *Association v. Robinson*, 78 Tex. 163; 14 S. W. Rep. 227. The note was to fall due at the maturity of the stock. If there was no profit on the shares, the payment of a dollar per month for 200 months would make each share worth \$200, which would mature the stock, and the note become payable at that time. The by-laws secure to each shareholder the right to withdraw at any time as much as he may have paid in on it. Hence, there could be no loss to the stockholder, and the time of maturity of stock and note could not be postponed beyond 200 months. Giving to the defendant the benefit of the longest time for the maturity of the note, it would fall due, as before stated, at 200 months from date. The premium (\$1,160) would then be paid, in addition to the annual interest which had been before paid, for the use of the sum of \$1,440 for that time. The premium paid would be at the rate of \$5.80 per month, or \$69.60 per annum, which, added to the annual interest, \$156, would make the sum of \$225.60 paid per annum for the use of the sum borrowed, which would be at the rate of about fifteen per cent, which, being in

excess of the lawful rate, would make the note void for the interest, and all payments made as interest should be credited upon the principal. If Abbott had desired to pay off the note before maturity of the stock, he must, in addition to the annual interest, have paid one-eighth of the premium for each year that he had the use of the money. If, for instance, at the end of the first year he wished to pay the note, he must pay the principal, \$1,440, and for the use of it for that year also pay \$145, in addition to \$156 interest already paid, making the sum of \$301 paid for using \$1,440 during one year — a fraction more than twenty per cent. Abbott could not discharge this note at any time without paying more than twelve per cent per annum for the use of the money. Hence, it was unquestionably usurious. When this case was before this court at a former term, it was considered alone upon the last proposition. A mistake was made in the calculation, by which the annual interest was omitted from the estimate of the sum paid for the use of the money, and thus it appeared to be less than twelve per cent on the money borrowed. The court, under this error, held the contract not to be usurious, but the mistake is evident to any one reading the opinion.

The Court of Civil Appeals found that Abbott paid as interest on this note the sum of \$715, and that in June, 1891, the defendant association declared his seven shares of stock matured, and fixed a value on the same at \$133.50 per share, which was paid to other stockholders of the same series. At this price the seven shares would amount to \$934.50. The note being usurious, Abbott was entitled, under the law, to have the money paid as interest applied to the payment of the principal, and that the balance of the note be satisfied out of the sum due him on the stock. Adding to the \$715 paid as interest the sum of \$934.50 due for stock would make the sum of \$1,649.50, from which deduct \$1,440, the principal of the note, and we have the sum of \$209.50, balance due to Abbott in June, 1891. This sum he had a right to receive, together with his six shares of stock of the fifth series; and he will be entitled to recover interest from the 1st day of July, 1891, on the balance due him, that date being the most definite time we can arrive at from the facts. For the error committed in holding the note to be free from usury, the judgments of the District Court and the Court of Civil Appeals

are reversed, and judgment is here rendered for the plaintiffs in error, Thomas H. Abbott and Johanna Abbott, that the injunction heretofore granted in this case be perpetuated, and that the defendants, William Holland and the International Building and Loan Association, be forever enjoined from enforcing in any manner the deed of trust executed by the plaintiffs in error, and described in the petition. It is further ordered that Thomas H. Abbott recover of the defendant the six shares of stock in said association held by it as security for the note mentioned and described herein, subject to all proper charges against it, if any, and also that said Thomas H. Abbott have and recover of the said International Building and Loan Association the sum of \$209.50, with interest at eight per cent per annum from the 1st day of July, 1891, with all costs of this suit, and that this judgment be certified to the District Court for observance.*

BUILDING AND LOAN ASSOCIATIONS — RECENT DECISIONS.

1. May have different sorts of stock under New York statute.— Laws of New York, 1892, chapter 689, article 5, section 170, after specifying certain matters to be inserted in the certificate of incorporation of a building and loan corporation, among which are "the amount of each share" of stock, and "the monthly or weekly dues per share," provides that the certificate may contain "such other provisions not inconsistent with law as shall be necessary for the convenient and effective transaction of its business." The law does not require that the stock of such a corporation shall be paid for in installments. Held, that a certificate which provides for three kinds of stock, viz., installment, prepaid and income stock, is not invalid on the ground that such a corporation can have only installment stock. *People ex rel. Fairchild v. Preston*, 140 N. Y. 549; 35 N. E. Rep. 979.

2. Withdrawal of stock — effect of domestic laws upon foreign corporations.— Revised Statutes, 1891, chapter 32, section 26, declare that "foreign corporations doing business in this state shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character, organized under the general laws of this state," and the act for the incorporation of homestead loan associations (R. S. 1891, chap. 32, § 83) provides that any stockholder may withdraw from such a corporation on thirty days' notice. Held, that an Illinois stockholder in a foreign homestead loan association doing business in Illinois might withdraw his stock on thirty days' notice, regardless of the provisions of his stock certificate. *Granite State Provident Association v. Lloyd*, 145 Ill. 620; 34 N. E. Rep. 142. But see case of *Falls v. United States Savings, L. & B. Assn.*, (Ala.) 13 South. Rep. 25.

* Reported in 25 S. W. Rep. 620.

3. Loans to persons not stockholders invalid.—A contract entered into with a building association, organized under the laws of Minnesota, by and through which it may be enabled to evade the statute, and loan its funds to a person not a member or shareholder of the association, is invalid and non-enforceable. *National Investment Co. v. National Savings, L. & B. Assn.*, 49 Minn. 517; 52 N. W. Rep. 138.

4. Usury.—A member of a building and loan association obtained from it a loan of \$1,440, and agreed to pay therefor \$2 600, with interest at six per cent, the extra \$1,160 being the premium on the loan. The agreement specified that the by-laws should be taken as a part thereof; and the by-laws provided that a borrower might redeem his shares by paying the money actually received by him and one-eighth of the premium for each year that he had had the money. Held, that the agreement was not usurious, since it was controlled by the by-laws, under which the amount to be paid for the use of the money was less than twelve per cent on the amount received. *International B. & L. Assn. v. Abbott*, 85 Tex. 220; 20 S. W. Rep. 118. In considering the question of usury in a loan from a building and loan association, payments made by the borrower on account of his stock are not to be considered, since such payments are not made for the use of the money borrowed, but in order to acquire an interest in the property of the association. *Ibid.* These points were decided upon a former appeal of the principal case.

A member of a building and loan association obtained from it a loan of \$384, and agreed to pay therefor \$768, with interest at six per cent, the extra \$384 being the premium on the loan. The agreement specified that the by-laws should be taken as a part thereof, and the by-laws provided that a borrower should repay one-eighth of the premium each year. Held, that the contract was usurious, since one-eighth of the premium would be more than twelve per cent on the amount of the actual loan. *Hensel v. International B. & L. Assn.*, 85 Tex. 215; 20 S. W. Rep. 116.

The dealings of building and loan associations with their own stockholders differ from ordinary loan transactions to such an extent as to warrant the legislature in excepting such associations, as to such dealings, from the operation of the provisions of the General Usury Law. *Vermont Loan & Trust Co. v. Withed*, 2 N. D. 82; 49 N. W. Rep. 318.

5. Where payment of dues may be made.—Where the constitution of a building and loan association prescribes the payment of an initiation fee at its commencement, and “at every meeting thereafter twenty-five cents a share as weekly dues,” and makes it the secretary’s duty to receive and account for the money of the association, a payment of dues at the secretary’s place of business is valid. *Schutte v. California Premium B. & L. Assn.*, 146 Penn. St. 324; 23 Atl. Rep. 336.

6. Insolvent associations — right of stockholder to receiver.—A shareholder in a building and loan association, whose officers have so mismanaged its affairs that its assets amount to less than two-thirds of the capital paid in, is entitled to have the corporate assets placed in the hands of a receiver. *Towle v. American B., L. & I. Soc.*, 60 Fed. Rep. 131.

7. Insolvent associations — adjustment of accounts between borrowing and non-borrowing members.—Where a building and loan asso-

ciation, organized under a statute which declares that borrowers may repay their loans at any time, and be entitled to a credit of one-eighth of the premium for each of the unexpired years of the association's eight-year period, is dissolved by a court of equity before the expiration of the eight-year period because it is losing money. the court called in all the loans, and distributed the proceeds among the stockholders, giving the borrowers credit for the unearned part of their premiums, as though they had voluntarily paid up, but gave them no credit on their loans for assessments and fines paid by them, since all the stockholders are alike responsible for the losses of the association. *Towle v. American B., L. & I. Soc.*, 61 Fed. Rep. 446.

WALKER V. HANNIBAL & ST. J. R. Co.

(Supreme Court of Missouri, Division No. 2, May 8, 1894.)

1. RAILROAD COMPANIES. LIABILITY FOR NEGLIGENCE OF BAGGAGEMAN IN DISCHARGING FREIGHT CARRIED GRATUITOUSLY WITHOUT AUTHORITY. Where defendant's baggageman — whose authority, as such agent, was merely to carry the baggage of passengers, and property of defendant — was, by arrangement with plaintiff, in the habit of gratuitously carrying drills for the lime company of which plaintiff was foreman, and throwing them out of the baggage car near the lime quarry, and it was not known by defendant's officers that he was carrying them as its agent, it is not liable for an injury to plaintiff, who was struck by the drills as they were thrown from the car by the baggageman.

2. EFFECT OF CONDUCTOR'S KNOWLEDGE OF BAGGAGEMAN'S PRACTICE IN CARRYING SUCH FREIGHT. Notice to a conductor, who has no authority over the baggageman on his train, that he is in the habit of carrying drills on his car for a lime company, and putting them off near its quarry, is not notice to the railroad company.

3. EFFECT OF STATION AGENT CAUSING SUCH FREIGHT TO BE PLACED IN BAGGAGE CAR. Where a station agent caused drills of a lime company to be put on a baggage car, and they were carried gratuitously, and thrown off by the baggageman near the lime company's quarry, the railroad company is not estopped to deny that the station agent acted without its knowledge and authority, it not being shown that he sent the drills as freight, or had any authority to send them on a passenger train.

Spencer & Mosman and *Fagg & Ball*, for appellant. *Harrison & Mahan*, for respondent.

BURGESS, J. Action to recover damages on account of personal injuries sustained by plaintiff by reason of the alleged negligence of the servant of defendant. The evidence showed that

the plaintiff was the general foreman in charge of the works of the Hannibal Lime Company, at Bear Creek, a small station on the line of defendant's road, six miles west of Hannibal; that the office of the lime company was in that city; that plaintiff had charge of all its business, including the shipment of lime from Bear Creek, and had been such foreman for five or more years previous to the injury; that he was accustomed to send iron drills, used for getting out the rock to make lime, to a blacksmith at Wither's Mills, two miles west of Bear Creek, to be sharpened. The drills were from five to six feet in length, weighing some thirteen pounds each. They were sometimes sent on wagons, sometimes on hand-cars and sometimes in defendant's baggage car. No instructions or directions were given as to the manner by which the drills were to be returned by the blacksmith. The blacksmith at Wither's Mills (Jacob Stover) was postmaster at that place, and was also defendant's ticket agent, and had been for about fifteen years before the accident. After the drills were sharpened by Stover, he would take them from the shop to the station house, and lay them down on the railroad platform in front of the depot. They were usually wired, three together. He would then tag the drills, "Hannibal Lime Company, Bear Creek station," or, if not so tagged, he would mark them with chalk in the same way. He would then, upon the arrival of defendant's passenger train from the west, put the drills in the baggage car, in charge of defendant's baggageman, who would receive them, place them in the car, and deliver them to the lime company at Bear Creek station. If the train stopped he would drop them off at the platform, and, if it did not stop, he would throw the drills off anywhere east of the rock chute. This way of delivering the drills by the baggageman had continued from ten or fifteen years before, and up to the day of the injury. It was a custom of long standing, and the drills were so delivered as frequently as from three to five times per week, and often every day in the week, during this long series of years. Each retiring baggageman would hand down the habit and custom to his successor. The evidence showed: That the plaintiff was in the habit of communicating with the managing officers of his company at Hannibal by letters, which he would throw into the baggage car as the train went by, and on the day of this accident he went down to the track in order to put

a letter which he had written his employers in Hannibal on the train, as he had been accustomed to do; that as the train came in he was standing with one foot on the rail of the side track nearest the main line, with the letter in his hand. When the train got within 200 feet of him he noticed the ends of the drills projecting out of the open door of the baggage car, saw them raised up, and saw the baggageman look out of the door, and down the track, towards the point where he was standing, and then withdrew himself inside the car. Anticipating that the drills were to be thrown off, plaintiff at once left his position by the side of the track, and ran northward to get out of the way; and he had gotten about fifteen feet from the point where he was standing when he was hit with the drills. The baggageman testified that he looked out of the door of the car, and down along the track, and, seeing plaintiff standing by the side of the track, stepped back into the car, and, bracing himself, swung the drills with all his might from the train, as far as he could throw them, for the purpose of avoiding any possibility of striking the plaintiff; that he did not see plaintiff move from the position where he had first seen him, and did not know that he had left that position; that, knowing the position where plaintiff stood, he supposed it would be perfectly safe to throw the drills over beyond the side track. The drills struck the ground, and, revolving, struck plaintiff, knocking him down, injuring his arm — the point of one of the drills entering his arm. A portion of one of the bones of the forearm had to be removed, thereby shortening that bone, and altering the normal position of the hand with relation to the wrist, and, as compared with his previous condition, permanently impairing the usefulness of the hand and arm. The evidence further showed that James, the man who threw the drills out of the car, was the agent of the American Express Company, and also a train baggageman in defendant's service; that under the regulation of the defendant, promulgated for the guidance and direction of train baggagemen, such baggagemen were not permitted to carry any article or commodity in the car which did not belong to the passengers on the train, and come properly within the designation of passenger's baggage, unless it was the property of the railroad company itself, such as tools, material or supplies sent out by it for its servants at the various stations; that drills shipped by the public

over the road properly fell within the designation of freight or express matter, and the train baggageman, James, was not authorized to carry them; that they could only be carried on a passenger train by the express company, as express matter. Plaintiff swore that defendant never, to his knowledge, received a cent for the carriage of the drills; that, so far as he knew, his company was the only party interested in their carriage. And this was corroborated by defendant's train baggageman, Mr. James, who testified that he was never instructed by defendant to carry the drills, and never informed any of its officers that he was carrying them; that plaintiff put the drills on the car at Bear Creek, and instructed him to throw them off at Wither's Mills for "Uncle Jake," and he carried the drills purely as a matter of accommodation, never having received anything for so doing. The present management of defendant company took charge in 1884, some two years before the accident. The superintendent, S. E. Crance, the trainmaster, T. S. Beeler, as well the general agent of defendant at Hannibal, E. F. Bradford, testified that they did not know that the drills were being carried by the baggageman on a passenger train. Plaintiff's evidence, however, showed that Woodward, the superintendent who preceded Crance prior to 1884, as well as Beeler, the trainmaster under the present management, had been seen in the baggage car on two or three occasions when drills were being carried by the baggageman. But the evidence further showed that the presence of drills in the car, if seen by them, would excite no suspicion that they were being carried by the baggageman for outside parties; that it was perfectly right and proper to carry drills and tools belonging to the defendant in the car, or to carry such drills in the baggage car as express matter. The evidence further showed that Hance, the conductor of the train, was frequently in the car when the drills were carried, and probably knew that the baggageman was carrying the lime company's drills; but it was shown that the train baggageman, in his department of work, and in respect to his special duties, was entirely independent of the conductor, who had no authority over him in respect to the nature of the articles carried in the car. Defendant demurred to the case made by plaintiff's evidence, and renewed its demurrer at the close of all the evidence, but it was overruled. A trial resulted in a judg-

ment for the plaintiff in the sum of \$5,000 ; and the defendant, after an unsuccessful motion for a new trial, brings the case to this court by an appeal.

Before the defendant can be held liable for the negligent act of its baggageman, it must be made to appear not only that at the time of the injury he was its servant, and in its employ, but that the act of the servant which occasioned the injury was done in the course of his employment. The master is not liable for the acts of the servant which are not connected with the service which the servant has been employed to perform. If, for instance, a servant should be employed to do a particular thing or kind of work, and does something else, without his master's consent, and, by reason of his negligence or carelessness, another is injured, the master is not liable, because the injury was not done in the course of his employment. In order that the master may be held liable the act causing the injury must pertain to the duties which the servant was employed to perform. If the baggageman, in delivering the drills, was not serving his master, but was merely doing so to accommodate others, and the master was deriving no benefit therefrom, then the master is not liable, even though the injury complained of would not have been committed without the facilities afforded by the baggageman's relations to the defendant. *Garretzen v. Duenckle*, 50 Mo. 104 ; *Cousins v. Railroad Co.*, 66 Mo. 572 ; *Mitchell v. Crassweller*, 13 C. B. 237 ; *Farber v. Railway Co.*, 116 Mo. 81 ; 22 S. W. Rep. 631. In *Coal Co. v. Heeman*, 86 Penn. St. 418, plaintiff, a small boy, climbed onto the cars, and a brakeman, after the train started, threw coal at him, striking him in the face, blinding him, and he slipped off and was run over. The evidence showed that the brakeman had no duty to perform in admitting or excluding persons from the train ; that this duty was vested solely in the conductor. The court denied a recovery, saying : " The legal rule was stated in the opinion of Alderson, J., in that case (*McKenzie v. McLeod*, 10 Bing. 385) to be that the act of the servant is the act of the master where the duty is defined by precise orders ; and where something is directed to be done, and the manner of doing it is left wholly to the discretion of the servant, the judgment exercised may be considered the judgment of the master, and he must be answerable. ' But where he has neither ordered

the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how, in common justice or common sense, the master can be held responsible.' An examination of all the testimony shows that there is nothing contained in it to prove that the brakeman whose conduct is complained of in the assault he made on the plaintiff was acting in pursuance of any authority conferred on him." In *Farber v. Railway Co.*, 32 Mo. App. 378, the court says: "The mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service cannot make the master liable. Something more is required. It must not only be done while employed, but it must pertain to the duties of the employment. That has been repeatedly decided in this state. *McKeon v. Railway Co.*, 42 Mo. 83; *Snyder v. Railroad Co.*, 60 Mo. 419; *Jackson v. Railway Co.*, 87 Mo. 430." In *Walton v. Car Co.*, 139 Mass. 556; 2 N. E. Rep. 101, "the defendant was the owner of sleeping cars running in the trains of the Boston and Albany railway over its road, and had in its employ as a porter on the car one Maxwell. Maxwell had arranged with a woman at Newton to do his washing, and the woman was to send her daughter to the train to get his soiled linen. Maxwell did the linen up in a bundle, and, as the train ran through the station without stopping, dropped the bundle off, and it struck plaintiff, a truckman on the Boston and Albany road, and injured him severely, and he brought suit against the sleeping car company. Plaintiff asked the trial court to rule that if Maxwell was in the employ of the defendant, paid by it for taking care of the car, allowed to keep articles of personal property of his own in the car, and, having such in his possession in the car on this occasion, carelessly and negligently threw the same from the car while passing over the railroad therein, in the performance of his general duties in the care of the car, and that the plaintiff then being in the exercise of due care, and rightfully on the railway, the defendant would be liable for all such damages resulting therefrom as would be legally recoverable for the injuries occasioned thereby." The judge refused so to rule, and ruled as follows: "The defendant is not responsible if the injury to plaintiff was done by Maxwell, the servant of defendant, without the authority of defendant, and not for the purpose of executing the defend-

ant's orders, or doing the defendant's work, and not while acting as such servant in the scope of his employment. If Maxwell was employed by defendant as a porter upon its parlor car, and wholly for the purpose of his own, and disregarding the object for which he was employed, and not intending by his act to execute it, negligently threw the bundle—his own property—from the platform of the parlor car, and thereby the plaintiff, who was not a passenger, was hit and injured while in the exercise of due care, and if this injury done by Maxwell was not within the scope of his employment, then the defendant is not liable." The judge also ruled, as requested by defendant, that, upon all the evidence, the plaintiff could not recover. The Supreme Court says: "The ruling and instructions of the court were correct. There was no evidence that Maxwell was employed by defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment, and it was wholly immaterial that he was at the moment riding in a car of the defendant, in which he was employed by it for other purposes." In *Cunningham v. Railway*, 31 U. C. Q. B. 350, the plaintiff was in the employment of one C., a contractor with defendant for building fences along its line. As a matter of convenience to him, he was permitted by defendant to carry his tools upon its trains, and was, at the time of the injury, taking two crowbars from Port Hope to a point on the line of the road where his men were at work. As the train passed the spot, C. dropped one bar out, and the baggage master pitched out the other, which struck and injured the plaintiff. The baggageman had nothing to do with C., nor any right to meddle with his tools, nor did he ask him to put the bar out. Held, that defendant was not responsible for the injury, for the baggageman was not acting as the servant for defendant, nor in pursuance of his employment.

The evidence shows that the baggageman in the case at bar was a special agent, having no general power, and that his duties were to look alone after the baggage of passengers. Carrying the drills, which occasioned the injury, was not within the line of his employment. It necessarily follows that the defendant cannot be held responsible for any injuries occasioned by the negligent handling of them, unless it was done by the direction of defend-

ant's officers and agents, or with their knowledge and consent, and for the benefit of defendant corporation. To establish this knowledge on the part of defendant's officers, it was shown that the conductor in charge of the train knew that it was the custom of the baggageman to carry the drills to and from Wither's Mills to Bear Creek, and to dump them off at the latter place on their return, while the train was in motion. Beeler, the general agent, E. F. Bradford, superintendent, and the former superintendent, Woodward, had been in the baggage car on several occasions when the drills were being carried by the baggageman. But the evidence also shows that the conductor had no control over the baggageman, who was also express messenger, and that it was not unusual to carry such things as express matter. The other parties — Crance, Beeler and Bradford — stated that they did not know that the drills were being carried by the baggageman for outside parties, even if they saw them. The plaintiff testified as follows: "I don't know that Mr. Beeler knew anything about the arrangement by which the bars were carried. * * * I never paid anything to the company for carrying the drills. I never knew the lime company to pay anything to the defendant for carrying them. * * * The railroad never received a dollar or a cent, to my knowledge, for the carriage of the drills, or the letters that I spoke of. * * * Q. No officer of the company knew anything about those drills being carried there, to your absolute knowledge? A. No, sir. * * * I knew the lime company was the only one interested. I did not speak to Mr. Woodward about the drills, nor let him know that the blacksmith was sharpening the drills for us, or that the drills were being carried on the train." The evidence did not show that the officers of the defendant knew that the baggageman was in the habit of carrying drills for the lime company; that they consented to it, or that it came within the line of his duty to do so, but it did show to the contrary. If it had been shown that the baggageman had been in the habit of carrying the drills and putting them off at Bear Creek station, by and with the knowledge and consent of defendant's officers, and as its agent, authority to do so might be inferred therefrom. *Edwards v. Thomas*, 66 Mo. 468. But he was also, at the same time, agent for an express company, and his conduct in handling the drills

was as consistent with the one service as the other. Moreover, he testified that he was not acting as baggageman in handling the drills; that he did so gratuitously, merely as an accommodation to the plaintiff; and the evidence of the plaintiff himself tended strongly to show that such was the case. The mere fact that the baggageman handled the drills was no evidence, of itself, that he was doing so in the capacity of baggageman, and was no notice to defendant. In order to make defendant liable for the act of the baggageman, for acts of negligence committed not in the line of his employment, it must be shown that he either had express authority to transact the business connected with the injury, or that defendant, by its officers, knew that he, as its agent, was so engaged, for such a length of time as would justify the presumption that he was authorized to so act. It was not enough that the conductor, Hance, had knowledge that the baggageman was in the habit of carrying the drills from Wither's Mills and putting them off at Bear Creek station for the lime company, for, as has been said, the conductor had no control whatever over him, and notice to him was not notice to the defendant company.

But it is contended by plaintiff that Jacob Stover, the defendant's ticket agent at Wither's Mills, shipped the drills on the passenger train of defendant of his own accord, without solicitation of plaintiff, and with the acquiescence, if not permission, of defendant, and that in so doing he was in the line of his employment as station agent, his act was that of the defendant, and that it is estopped to deny that its agent acted without its knowledge and authority. That this position is correct, with respect of the acts of a station agent clothed with the power to receive and forward freight, and who acts within the scope of his authority, seems to be well-settled law. *Harrison v. Railway Co.*, 74 Mo. 370, and authorities cited. But there was not one scintilla of evidence which showed, or tended to show, that the drills were sent as freight, or that Stover had any authority to send them as such, or in any other way, on defendant's passenger trains. Stover's acts in sending the drills by the baggageman, as well, also, as of the latter in handling them, were unauthorized by defendant, who should not be held responsible for the injury under the circumstances disclosed by the evidence. The arrangement seems to have been one between plaintiff, for the lime com-

pany, and James, the train baggageman, with reference to something not in the line of his employment, and of which his employer had no knowledge and gave no consent.

Under the views herein expressed, it becomes unnecessary to pass upon the question as to what duty defendant owed plaintiff at the time of the injury, when on its right of way for the purpose of mailing letters upon its train. The demurrer to the evidence should have been sustained. The judgment is reversed. All of this division concur.*

Railroad companies — liability for acts of servant — acts not within scope of employment.—The principles underlying the foregoing case pertain to the law of master and servant, and are thus stated by Mr. Wood in his *Law of Railways*: “The doctrine of respondeat superior does not apply simply from the circumstance that, at the time when an injury is inflicted, the person inflicting it was in the employ of another,” but, “in order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it. That is, *it must be an act which is fairly incident to the employment*; in other words, an act which the master has set in motion. * * * It is not the instructions of the master that determine the extent and limits of the servant’s authority, but the nature of the employment, the character of the service required, the character of the act done, and the circumstances under, and the purpose for, which it was done. In determining the question of authority, regard must be had to the object, purpose and end of the employment. * * * A master cannot screen himself from liability for an injury committed by his servant within the line of his employment by setting up private instructions or orders given by him, and their violation by the servant. By putting the servant in his place, he becomes responsible for all his acts within the line of his employment, even though they are willful and directly antagonistical to his orders. The simple test is, whether they were acts *within the scope of his employment*; not whether they were done while prosecuting the master’s business, *but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him*. By *authorized* is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders.” 2 Wood on Railroads, 1386, 1398, 1404. In section 316, pages 1382–1406, Mr. Wood gives numerous illustrations of the application of these principles to particular facts, most of which, however, lie outside of railroad lines.

A railroad company is liable for an injury to a passenger occasioned by the acts or negligence of its servant while such company is engaged through such servant in carrying out its contract with the passenger, whether the act of the servant is willful or otherwise. Thus, if the servant assaults the passenger, or wrongfully causes his arrest, the company is liable. *Dwinelle v. New York*

* Reported in 26 S. W. Rep. 360.

Central, etc., R. Co., 2 Am. R. R. & Corp. Rep. 492, and note; Savannah, etc., R. Co., v. Bryan, 3 Am. R. R. & Corp. Rep. 584; Conger v. St. Paul, etc., R. Co., 45 Minn. 207; 47 N. W. Rep. 788; Gillingham v. Ohio River R. Co., 5 Am. R. R. & Corp. Rep. 320, and note; Lake Shore, etc., R. Co. v. Prentice, 7 Am. R. R. & Corp. Rep. 406, and note.

In *Mulligan v. New York, etc., R. Co.*, 129 N. Y. 506; 29 N. E. Rep. 952, it appeared that a detective had informed defendant's ticket agent that three men were engaged in passing counterfeit five-dollar bills, and requested him to be on the lookout for them. Shortly after the plaintiff, accompanied by a friend, applied to the agent for the purchase of two tickets, and tendered a five dollar bill. The agent thought the bill a counterfeit and that the plaintiff was one of the three men wanted by the police. The agent took the bill, gave the plaintiff his tickets and change and then proceeded to have him arrested, while he was about the depot waiting for his train, on the charge of passing counterfeit money. The bill passed by plaintiff was shown to be genuine and he was discharged. It was held by a majority of the court that the agent, in accepting a bill which he believed to be a counterfeit and in causing the plaintiff's arrest, was acting outside the scope of his employment, and not in violation of any duty which the defendant owed the plaintiff as a passenger, and that the defendant was not liable for the false arrest.

But where a plaintiff purchased a ticket and gave therefor a piece of money which the agent accepted as genuine, but which he afterwards believed to be a counterfeit, and the agent thereupon demanded back the ticket and change, and, upon being refused, charged the plaintiff with having uttered counterfeit money and with being a prostitute, and threatened to have her arrested and detained her for that purpose, it was held that the agent acted within the scope of his employment and that the company was liable. *Palmeri v. Mannattan R. Co.*, 133 N. Y. 261; 30 N. E. Rep. 1001. See, also, *Norfolk & W. R. Co. v. Galliher*, 89 Va. 639; 16 S. E. Rep. 935.

In *Stephenson v. Southern Pac. R. Co.*, 93 Cal. 558; 29 Pac. Rep. 234, the plaintiff was crossing defendant's track in a street car. An engine stood on the track about twenty-five feet from the crossing. As the car was about to cross the track the engine was started towards the car. The plaintiff, believing that a collision was imminent, jumped from the car and was injured. The court instructed the jury that if the engineer started the engine towards the car for the purpose of frightening the passengers, and the plaintiff believed and had reasonable cause to believe that a collision was imminent, then the defendant was liable. The Supreme Court held that this was error, and says: "The engineer was not acting within the scope of his employment, as assumed in this instruction, if his object in moving the engine was simply to frighten the passengers in the street car. Such an act, done for such a purpose, was entirely foreign to the objects of his employment. The work which the engineer was to perform for defendant was to manage the engine while it was engaged in switching cars, and if he started the engine, not for the purpose of employing it in the service of the defendant, but to accomplish an independent purpose of his own, of the character stated in the instruction, the relation of master and servant, as to that particular act, did not exist, and the defendant would not be liable for any damage resulting therefrom, and it is

immaterial that he used the engine of defendant in order to accomplish his unlawful purpose."

Where an employee of a railroad company, going on a handcar on business not connected with the company, permitted a boy to ride with him, and the boy was thrown off and injured, it was held that the company was not liable. *Gulf, etc., R. Co. v. Dawkins*, 3 Am. R. R. & Corp. Rep. 75. *Tyler v. Chesapeake & O. R. Co.*, 88 Va. 389; 13 S. E. Rep. 975, is a case where boys were permitted to ride on a handcar, on condition that they would assist in loading the car. The car collided with a train, and one of the boys was injured. The trial court, in effect, directed a verdict for the defendant, which was held to be error.

The act of the agent of a railroad company, who also kept a store at the station, in placing an open barrel of salt under a warehouse situated beside the track, and which belonged to a milling company, though on the railroad's right of way, is not the act of the railroad company, so as to render them liable for injuries to cattle attracted thereby. *Berger v. St. Louis, etc., R. Co.*, (Mo.) 27 S. W. Rep. 393.

For the liability of a railroad company for the acts of a brakeman in removing a trespasser from a train, and for injuries caused by mail bags thrown from train by mail agent, see, respectively, *Smith v. Louisville & N. R. Co.*, ante, p. 843, and *Bradford v. Boston & M. R. Co.*, ante, p. 850.

STATE EX REL. HASKELL, ATTORNEY-GENERAL, V. GREAT NORTHERN RY. CO.

(Supreme Court of Montana, April 30, 1894.)

RAILROAD COMPANIES. COMPELLING COMPANY TO OPERATE ROAD DURING A STRIKE. The state Supreme Court has no jurisdiction to compel an interstate railroad company to operate its road within the state, in the face of a general strike, on the allegation that enough competent men are willing to work "for reasonable compensation."

MANDAMUS on relation of Henri J. Haskell, attorney-general, to compel the Great Northern Railway Company to operate its lines within the state. Writ denied.

Henri J. Haskell, T. J. Walsh and R. R. Purcell for relator.

PER CURIAM. Upon this petition the attorney-general asks this court to issue a writ of mandamus addressed to and commanding the Great Northern Railway Company to operate its lines of railway in this state, as it had been accustomed to do prior to the

13th day of April, 1894, when such operations ceased altogether, as described in the petition, to the end that the public shall not be inconvenienced and damaged by deprivation of the use of this quasi public agency of commerce, travel and communication. In making this application, counsel on behalf of the petition admit — a fact of general notoriety, too — that the cessation of operation of said railway was occasioned by a general refusal of the employees of said company engaged in operating the same up to that date to serve the company for the wages proposed to be paid, and because of the disagreement on that subject the employees on said lines went out on what is known as a general “strike,” awaiting an adjustment of that controversy. The petition alleges that sufficient competent, skillful and experienced men are available, ready and willing to serve said company in the operation of said road for reasonable compensation; and this is admitted to be the main predicate upon which a decision in this proceeding would turn if the court entertains the proceeding. It is, therefore, proposed that this court shall inquire and determine what would be a schedule of reasonable wages for a corps of skilled and unskilled employees necessary to operate said railway, and then ascertain whether the requisite number of employees can be procured at the wages determined, and, if that fact is found to be true, as alleged, then command the operation of said railway under the penalties attached to disobedience of the writ of mandamus. Those questions mentioned must be determined by the court upon proper inquiry whether the respondent should answer and traverse the allegations of the petition or no, because the court, before sending forth this extraordinary writ, will, by careful inquiry, become satisfied of its own jurisdiction, and that the conditions are such that the act commanded is feasible of performance. If the proposed scheme is feasible, and the court has jurisdiction to carry it out, it evidently affords a remedy going far towards the solution of a problem of great moment to all parties concerned. But, aside from the relations of this property to interstate jurisdiction, as shown by the averments of the petition, already asserted by the United States courts to some extent, the difficulty is that this court does not at present possess jurisdiction for the arbitrament of the question involved, as aforesaid, and, having ascertained what is just in the premises, to enforce the

same upon contending parties. The time may come when the state—that is, the national government, by reason of its interstate jurisdiction—may, by proper provisions of law, come into the attitude of permanent trustee of such property so vitally related to the welfare of the whole people, instead of the occasional exercise of trusteeship by receivers, when the property has become financially swamped; and then the proper courts will be empowered to interpose an equitable authority in a threefold direction for the orderly correction of abuses existing towards employees and investors (minority as well as majority stockholders) of the vast capital involved in such property, and also towards the public as patrons thereof. For the reasons suggested, we must deny this application. The cases called to our attention lead to this conclusion also. All concur.*

1. Railroad companies—mandamus to operate line.—This appears to be a case of first impression. Compare *City of Powtin Place v. Topeka Ry. Co.*, 8 Am. R. R. & Corp. Rep. 479, and cases referred to in note thereto.

2. Suit by state to enjoin a railroad company from removing track and abandoning a portion of its road.—In *State ex rel. Nayler, County Attorney, v. Dodge City, M. & T. R. Co.* (Kans.) 36 Pac. Rep. 747, it was held that the roadbed and superstructure of a railroad built under a charter obtained in accordance with the laws of this state is charged, not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations, and cannot be diverted from the purpose to which it was devoted, nor relieved from this burden, without the consent of the state, duly expressed by the legislature or other competent authority. The court says: "While the title to a completed railroad is vested in the corporation, it is only private property in a qualified sense. Railroads, like all other public thoroughfares, are public instrumentalities. The power to construct and maintain railroads is granted to corporations for a public purpose. The right to exercise the very high attributes of sovereignty, the power of eminent domain, and of taxation to further the construction of railways could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the roadbed, superstructure and other permanent property of the corporation are devoted to the public use. From this use neither the corporation itself, nor any person, company or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the state. It matters not whether the enterprise, as an investment, be profitable or unprofitable. The property may not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanc-

* Reported in 36 Pac. Rep. 458.

tion, railroads could not be constructed. When once constructed they may only be destroyed with the sanction of the state. The legislature unquestionably has the power to authorize the abandonment of railroads when they cease to be of public utility. It may be, also, that in an action prosecuted by the attorney-general, on behalf of the state, to forfeit the charter and wind up the affairs of a railroad corporation for any proper cause, the court might make all necessary orders for the disposition of the property of the company; but in this case the state appeared by the county attorney of the county in which the road was located, protesting against the removal of the superstructure of the road. The court erred in refusing the injunction asked. The general propositions stated above are abundantly supported by authority. *Railroad Co. v. Casey*, 26 Penn. St. 287; *State v. Sioux City & P. R. Co.*, 7 Neb. 357; *People v. Louisville & N. R. Co.*, 120 Ill. 48; 10 N. E. Rep. 657; *Railroad Comrs. v. Portland & O. C. R. Co.*, 63 Maine, 269; *Peoria & R. I. Ry. Co. v. Coal Valley Min. Co.*, 68 Ill. 489; *Gates v. Railroad Co.*, 53 Conn. 333; 5 Atl. Rep. 695; *Thomas v. Railroad Co.*, 101 U. S. 71; *Railroad Co. v. Winans*, 17 How. 30; *Pierce v. Emery*, 32 N. H. 484; *People v. New York, etc., R. Co.*, 28 Hun, 543. These views are also in accordance with prior decisions of this court. *Commissioners v. Miller*, 7 Kans. 479; *Railroad Co. v. Ryan*, 11 Kans. 603; *State v. Lawrence Bridge Co.*, 22 Kans. 438; *City of Powtin Place v. Topeka Ry. Co.*, 51 Kans. 609; 33 Pac. Rep. 309."

ATTORNEY-GENERAL V. BOSTON & A. R. Co.

SAME V. OLD COLONY R. Co.

(Supreme Judicial Court of Massachusetts, November 3, 1893.)

1. RAILROAD COMPANIES. LEGISLATIVE CONTROL. VALIDITY OF STATUTE MAKING MILEAGE TICKETS OF EACH ROAD GOOD ON ALL ROADS IN THE STATE. The statute of 1892, chapter 389, requiring a railroad company to sell 1,000 mile passenger tickets for twenty dollars, to redeem such tickets on presentation by any other company, and to accept for fare over its own lines all such tickets issued by any railroad company operating within the state, is unconstitutional, as authorizing one railroad to determine the conditions on which another railroad must carry passengers, and as compelling one railroad to carry passengers on the credit of another, thus appropriating individual property to the public use without the owner's consent.

2. Such a statute is not invalid on the ground merely that certain railroads may be excepted from its operation by the order of the railroad commissioners.

PETITIONS by the attorney-general against the Boston and Albany Railroad Company and the Old Colony Railroad Company to compel said companies to comply with the statute of 1892, chapter 389, requiring railroad companies to issue mileage

tickets, and to receive those of other roads in payment of fare. Reported for the consideration of the full court.

The petitions were in the following form :

“ Albert E. Pillsbury, attorney-general, in behalf of the commonwealth, informs the court that the Old Colony (or the Boston and Albany) Railroad Company is a railroad corporation established under the laws of the commonwealth, and operating a railroad therein ; and that it is required by a law of the commonwealth, being chapter 389 of the acts of the year 1892, to provide and have on sale for twenty dollars, and to sell to all persons applying therefor, mileage tickets for passenger transportation representing one thousand miles ; and to redeem all such tickets, or any part thereof, upon presentation by any other railroad corporation ; and to accept and receive from all persons for fare and passage over its own lines all such tickets issued by any other railroad corporation operating within the commonwealth, as therein prescribed. The defendant, though duly demanded, willfully and wrongfully neglects and refuses to comply in any particular with the requirements of the law as hereinabove set forth, which willful and and wrongful neglect and refusal has continued from the taking effect of the law until the present time, and declares its purpose and determination not to comply therewith, which conduct is a violation of the law, and of the public right thereunder, for which there is no adequate remedy except by this proceeding. Wherefore the informant prays that the defendant be required and compelled, by writ of mandamus or other appropriate process, to provide and sell such mileage tickets to all persons applying therefor, and to redeem all such tickets, or any part thereof, on presentation by any other railroad corporation, and to accept and receive from all persons for fare and passage upon all its own lines all such tickets issued by any other railroad corporation operating within the commonwealth, and in all particulars to comply with the requirements of the law as therein set forth, and for such other orders in the premises as justice may require.”

The Attorney-General, pro se. J. H. Benton, Jr., for defendant Old Colony Railroad Company. S. Hoar and W. Hudson, for defendant Boston and Albany Railroad Company.

FIELD, Ch. J. The brief for the Old Colony Railroad Company raises the questions whether the attorney-general has any right to bring the informations, and whether the court has any jurisdiction over the proceedings. It is said that the statutes of 1892, chapter 389, does not give the court equity jurisdiction to enforce its provisions, but we do not regard these informations as informations in equity. They are rather petitions for a writ of mandamus. See Pub. Stat. chap. 186, § 13. It concerns the public, or an indefinite portion of the public, whether railroad corporations not exempted or excluded by the railroad commissioners shall obey the Statutes of 1892, chapter 389, and, therefore, we think that the attorney-general as representing the public can properly institute these proceedings. *Attorney-General v. Boston*, 123 Mass. 460.

At the hearing of the petition against the Old Colony Railroad Company the presiding justice excluded evidence against its objection "tending to prove the allegation of fact in the third, seventh and eighth paragraphs of its answer." These paragraphs are as follows: "Third. The railroads thus operated by it [the defendant] are in the states of Massachusetts and Rhode Island, and form connecting and continuous lines of interstate transportation and travel, and the regulation of the rates for and the conduct of passenger transportation thereon in this state substantially affect the rates for and the conduct of said interstate transportation thereon." "Seventh. It says that there are railroad corporations operating railroads in the commonwealth that are not pecuniarily responsible for the redemption and payment of tickets which may be issued by them under chapter 389 of the acts of the year 1892. Eighth. It says that chapter 389 of the acts of the year 1892, referred to in said information, is a reduction of its fares and tolls for passenger transportation established by its directors, and of its earnings therefrom, contrary to the provisions of its charter, and is not a revision or alteration of its fares and tolls in the manner prescribed thereby, or by the general law relating to railroad corporations."

The Statutes of 1892, chapter 389, can, we think, be construed as relating only to fares for the transportation of passengers from one point to another within the commonwealth, and if, under the existing regulations of the railroad company, there may be some

difficulty in applying the law when a passenger intends to proceed from or to a point within the commonwealth to or from a point outside of the commonwealth, we do not see that this difficulty is inherent in the subject, or that by proper regulations the fares of passengers for transportation within the commonwealth cannot be paid for by mileage tickets, although the passengers are traveling to or from a place beyond the limits of the commonwealth. It is no sufficient objection to the statute that it may incidentally affect commerce between the states, if it does not attempt to regulate such commerce. See *Louisville, N. O. & T. Ry. Co. v. State of Mississippi*, 133 U. S. 587; 10 Sup. Ct. Rep. 348.

The averments of the seventh paragraph relate to a possibility, rather than a fact, because it is not alleged that any railroad corporations which are not pecuniarily responsible have issued any mileage tickets under Statutes of 1892, chapter 389, or that all such corporations have not been excluded from the provisions of the statute by the railroad commissioners. It is, in effect, an argument by way of an example of what might happen if one railroad company is required to transport passengers on the credit of another. The constitutionality of the statute cannot depend upon the solvency or insolvency of any particular railroad company at any particular time.

The averments of the eighth paragraph are not to the effect that Statutes of 1892, chapter 389, will, if carried into effect, operate to reduce the fares for passenger transportation below what is reasonable, but only that the statute will cause a reduction contrary to the provisions of the charter of the defendant. The Old Colony Railroad Company is a corporation in this commonwealth and in the state of Rhode Island, formed by the union of various railroad corporations chartered by this commonwealth or by the state of Rhode Island, and is also the lessee of the Boston and Providence Railroad Corporation and of other railroad corporations. The earliest charter of any of the railroads leased is that of the Boston and Providence Railroad Corporation, which was approved June 22, 1831. The earliest charter of any of the railroads which make up this defendant corporation is that of the Taunton Branch Railroad Corporation, which was approved April 7, 1835, being Statutes of 1835, chapter 131. The fourth

section of this last-mentioned statute contains the provision "that the legislature shall not at any time so reduce the tolls and their profits as to produce less than ten per cent per annum upon the capital stock paid as aforesaid without the consent of said corporation." The charters of other railroads which have been united to form the Old Colony Railroad Company contain similar provisions. These charters also grant to the corporations the right to take tolls at such rates as may be established by the directors. Similar provisions were enacted in the Revised Statutes (R. S. chap. 39, § 83), and in the General Statutes (Gen. Stat. chap. 63, § 112). Statutes of 1870, chapter 325, section 1, repealed General Statutes, chapter 63, section 112, and provided as follows: "Any railroad corporation may establish for its sole benefit, fares, tolls and charges, upon all passengers and property, conveyed or transported on its railroad, at such rates as may be determined by the directors thereof, and may from time to time by its directors regulate the use of its road; provided, that such rates of fares, tolls and charges, and regulations shall at all times be subject to revision and alteration by the legislature, or such officers or persons as the legislature may appoint for the purpose, anything in the charter of any such railroad corporation to the contrary notwithstanding." Statutes of 1874, chapter 372, section 4, is as follows: "Railroad corporations heretofore established in this commonwealth, whether by special act or in conformity with the provisions of the general law passed in the year one thousand eight hundred and seventy-two, shall have the powers and privileges and be subject to the duties, liabilities, restrictions and other provisions contained in this act; which, so far as inconsistent with charters granted since the eleventh day of March, one thousand eight hundred and thirty-one, shall be deemed and taken to be in alteration and amendment thereof; provided, that nothing herein contained shall be construed to impair the validity of any special power heretofore conferred by charter or other special act upon any particular railroad corporation which has already exercised such power or to prevent the continued exercise thereof, conformably, so far as may be, to the provisions of this act; nor shall anything herein contained affect any act done or any right accruing, accrued or established, or any proceedings, doings or acts ratified or confirmed, or any suit or proceeding had or commenced in any case

before the act takes effect," etc. Section 179 of this statute is as follows: "Any railroad corporation may establish for its sole benefit fares, tolls and charges upon all passengers and property, conveyed or transported on its railroad, at such rates as may be determined by the directors thereof, and may from time to time by its directors regulate the use of its road; provided, that such rates of fares, tolls and charges and regulations shall at all times be subject to revision and alteration by the legislature, or such officers or persons as the legislature may appoint for the purpose, anything in the charter of such railroad to the contrary notwithstanding." These provisions were re-enacted in Public Statutes, chapter 112, sections 2, 180. All the charters involved in these proceedings were granted subsequently to the passage of Statutes of 1831, chapter 81, approved March 11, 1831, which provided "that the acts of incorporation which shall be passed after the passage of this act shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the legislature, and in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation as to the duration of the same." R. S. chap. 44, § 23; Pub. Stat. chap. 105, § 3.

It is evident that the legislature, in the year 1870 and since, has attempted to repeal the special provisions of the early charters of railroads which purported to limit its right to reduce fares or tolls below ten per cent of the cost of the roads. An examination of the statutes will show that since the year 1870 the Old Colony Railroad Company has accepted the benefit of legislation "subject to all general laws which now are or hereafter may be in force relating to railroad corporations." One instance mentioned in the brief of this company is the union of the company with the Boston, Clinton, Fitchburg and New Bedford Railroad Company, pursuant to Statutes of 1882, chapter 80. The Boston, Clinton, Fitchburg and New Bedford Railroad Company was formed by the union of the other railroads. The Agricultural Branch Railroad Company was incorporated by Statutes of 1847, chapter 269, and was subject "to all the duties, liabilities and restrictions set forth in the forty-fourth chapter of the Revised Statutes, and in that part of the thirty-ninth chapter of the Revised Statutes relating to railroad corporations, and in the public statutes which

have been, or may be passed, relating to railroad corporations." The name of this railroad company was by chapter 153, Statutes of 1867, changed to the Boston, Clinton and Fitchburg Railroad Company. The New Bedford Railroad Company was incorporated by Statutes of 1873, chapter 20, "subject to all the restrictions, duties and liabilities set forth in all the general laws which now are, or hereafter may be, in force relating to railroad corporations;" and this company, after it had purchased or united with the Taunton Branch Railroad Company, was authorized to unite "with the corporation that may be formed by the union of the Mansfield and Framingham Railroad Company with the Boston, Clinton and Fitchburg Railroad Company." None of these charters contain any provision that the tolls should not be reduced by the legislature below ten per cent of the cost of the roads, or any provisions on the subject. It may at some time deserve consideration whether, when a railroad voluntarily unites with other railroads, and there are special provisions concerning tolls in some of the charters and none in others, and the union is effected under a statute which provides that the corporation thus formed shall be subject to all general laws which now are or hereafter may be in force relating to railroad corporations, these special provisions continue in force, and are applicable to the consolidated corporation. In view of the many changes in the charters of nearly all the railroad corporations of the commonwealth occurring since 1870, which have been accepted by the corporations, it may well raise a doubt whether these corporations have not consented to be subject to any laws which the legislature under its general powers may constitutionally enact concerning fares or tolls. But, whether these special provisions can be regarded as still in force, and, if so, whether they could be repealed by the legislature without the consent of the corporation, under the power reserved to amend, alter or repeal the charters, we have not found it necessary to determine in the present cases.

It is argued by both defendants that the statute is in violation of the provision of the Constitution of the United States, article 1, section 10, that "no state shall * * * make anything but gold and silver coin a tender in payment of debts." The meaning of the statute is, we think, that the delivery of a

mileage ticket shall discharge the passenger from liability to the railroad for his transportation, but that the railroad issuing the ticket shall be liable to pay to the railroad transporting him, in lawful money, the statutory price of the ticket or part of a ticket which the passenger has surrendered. The intention is that the railroad performing the service shall ultimately be paid the statutory fare in lawful money, not that the ticket of itself shall be a legal tender. If the legislature cannot constitutionally require a railroad company to transport a passenger unless the fare is paid in advance, we have no doubt that the delivery of a mileage ticket issued by another corporation is not of itself a payment of the fare. We assume, however, in favor of the commonwealth, without deciding or expressing any opinion upon it, that it is not absolutely necessary that the fare of a passenger on a railroad be paid in advance in money.

There remain to be considered the objections of both defendants' that the statute establishes a uniform rate per mile, and requires one railroad company to transport a passenger upon the credit of another; that the conditions affecting the transportation imposed by the road which issues the tickets must be performed by any other road to which the ticket is presented, unless the road is exempted or excluded from the provisions of the statute; and that authority is given to the railroad commissioners to exempt or exclude from the provisions of the statute any railroad if, in their judgment, the public welfare or the financial condition of the road requires or demands it. The legislature has prescribed the rate of fare per mile, but has not undertaken to prescribe in other respects the form of contract which each railroad may make for the transportation of passengers. It has not adopted a standard form of contract, as it has done, for example, with reference to fire insurance policies. Pub. Stat. chap. 119, § 139. One company may permit no baggage of any kind to be carried with the passenger on a mileage ticket, and another company may permit personal baggage or any baggage to an amount not exceeding 100 or 1,000 pounds in weight; and according to the terms of the first section of the statute one railroad must, on the presentation of a mileage ticket issued by another, perform the conditions of the contract as issued by the other. The power of the legislature of a state to prescribe the charge or the maxi-

mun charge to be made for the use of property "affected with the public interest" was first elaborately considered by the Supreme Court of the United States in what are called the "Granger Cases." *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Railway Co.*, 94 U. S. 164; *Railroad Co. v. Ackley*, 94 U. S. 179; *Railroad Co. v. Blake*, 94 U. S. 180; *Stone v. Wisconsin*, 94 U. S. 181. Whatever difference of opinion there may have been among the justices of that court concerning the tests which determine whether property is affected with a public interest, there is no doubt that the property of railroad corporations which have been invested by the legislature with the right of eminent domain, and are common carriers of persons or merchandise, is property "devoted to a public use." See *Railway Co. v. Wellman*, 143 U. S. 339; 12 Sup. Ct. Rep. 400, and *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468. The justices of the Supreme Court of the United States perhaps differ in opinion whether there can be any judicial interference with the rates for railroad transportation established by the legislature of a state on the ground that they are not reasonable, but they agree that the property of railroads is property devoted to a public use, and that the legislature may establish rates, or reasonable rates, unless there is an express provision in the charter which forbids it. See *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418; 10 Sup. Ct. Rep. 462, 702, and *Budd v. New York*, *supra*. In the railroad commission cases (*Stone v. Trust Co.*, 116 U. S. 307; 6 Sup. Ct. Rep. 348, 388, 1191; *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347; 6 Sup. Ct. Rep. 348, 388, 1191; *Stone v. New Orleans & N. C. R. Co.*, 116 U. S. 356; 6 Sup. Ct. Rep. 349, 391) a majority of the Supreme Court of the United States decided that a grant to a railroad company in its charter of the right to fix and regulate the tolls and charges, substantially such as are contained in the charters of the defendants in the present cases, does not deprive a state of its power to regulate rates. The court says: "It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what

is done amounts to a regulation of foreign or interstate commerce." The court held that a general power given to the corporation to establish rates is not such a contract as restrained the legislature from establishing what it deemed reasonable rates. See *Railroad Co. v. Miller*, 132 U. S. 75; 10 Sup. Ct. Rep. 34. It was also said that "under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons and property without reward; neither can it do that which in the law amounts to a taking of private property for public use without just compensation, or without due process of law." See *Banking Co. v. Smith*, 128 U. S. 174; 9 Sup. Ct. Rep. 47; *Dow v. Beidelman*, 125 U. S. 680; 8 Sup. Ct. Rep. 1028; *Ruggles v. People of Illinois*, 108 U. S. 526; 2 Sup. Ct. Rep. 832. In *Parker v. Railroad Co.*, 109 Mass. 506, the authority of the legislature of this commonwealth was maintained to fix the rate of toll to be paid by a street railway company to the East Boston Ferry Company for the carriage of passengers in cars over the ferry. There was a provision in the charter of the ferry company that the company be allowed to collect and receive such tolls as the mayor and aldermen of Boston should determine, provided that "the rates of ferriage shall never be reduced so much as to reduce the yearly dividends of said company to an amount less than eight per cent on the amount of the capital stock actually invested." The decision is put upon the ground that the statute fixing the rates is an amendment of the charter. The court say: "The power of regulating tolls upon ferries, barges and turnpikes has been constantly exercised by the legislature. The great object of such corporations is the accommodation of public travel; and most, if not all, of the charters creating them contain provisions for the regulation of the tolls they are entitled to charge the public. The charter of the East Boston Ferry Company contains such provisions. The legislation in question is not upon a subject foreign to the provisions of the charter or the subject of the grant. It is strictly in alteration or amendment of such provisions, and it is designed to promote the chief object of the grant." It appears from the original papers in this case that the mayor and aldermen of Boston had fixed rates of toll over the ferry for foot passengers and for vehicles, but none expressly for horse cars, and that the rates fixed for foot passengers were twice or three times

as much as those fixed in the statute for passengers in the horse cars. It also appeared that the established rates of toll were not sufficient to enable the company to pay "any dividends on the stock actually invested." The court did not, however, expressly consider whether the provision of the charter that the tolls should not be reduced "to an amount less than eight per cent on the amount of capital stock actually invested" constituted a contract which could not be avoided except by a repeal of the charter. The statute there considered affected only the rates of toll for passengers in horse cars, leaving untouched all other rates. See *Roxbury v. Railroad Co.*, 6 Cush. 424; *Massachusetts General Hospital v. State Mut. Life Assur. Co.*, 4 Gray, 227; *Fitchburg Railroad Co. v. Grand Junction Railroad Co.*, 4 Allen, 198; *Com. v. Eastern Railroad Co.*, 103 Mass. 254; *Mayor, etc., of Worcester v. Norwich & W. R. Co.*, 109 Mass. 103; *In re Mayor, etc., of City of Northampton*, 158 Mass. 299; 33 N. E. Rep. 568.

It is conceded in the present cases, as we understand, that the legislature of a state, unless prevented by some contract, can constitutionally establish reasonable rates of fare for railroad companies within the state, and we regard it as settled that the legislature of a state having a Constitution like that of Massachusetts can establish rates of fare for the transportation within the state of passengers and merchandise by railroad companies which are common carriers, unless the state is prevented by some contract with the railroad company; but it is not, however, yet settled what the limitations of this power are, whether it is limited to such rates as a court may deem reasonable, or only to such rates as shall not operate to deprive the railroad companies of their property without just compensation or without due process of law. It becomes, however, unnecessary at the present time to determine the limitations of this power, because it has not been contended in the present cases that the rates established by the statute are unreasonable. The legislature, if it sees fit, may establish rates for each railroad separately, and, as different railroads may reasonably require different rates, we see no objection to the statute on the ground that certain railroads may be exempted or excluded from its provisions. The subject is one upon which legislation need not be uniform, and the statute cannot be avoided by one railroad company because it is not applied

to another. In *re Mayor, etc., of City of Northampton*, *ubi supra*. We think that the intention of the statute is that it shall apply to every railroad corporation operating a railroad for the common carriage of passengers within the commonwealth, unless the board of railroad commissioners shall determine on petition, after due hearing, that there is something exceptional in the financial condition of a particular railroad, or in the character of the service it renders to the public, which reasonably requires that railroad to be exempted or excluded from the provisions of the statute, leaving such a railroad to be specially dealt with by the legislature, if it should deem it necessary. We are not satisfied that the statute is unconstitutional on the ground that it contains a delegation of legislative power to the board of railroad commissioners.

The most formidable objections are that the statute authorizes one railroad to determine the conditions on which another railroad must carry passengers, and compels one railroad to carry passengers on the credit of another. We have been referred to no judicial decision where any such legislation has been considered. The law governing the taking of private property for public uses affords some analogies which we think are applicable to the present cases. The decisions of this court perhaps go as far as any in permitting an entry upon land and an occupation of it for the purpose of taking it for public uses before reasonable compensation has been actually made, and in not requiring that an adequate fund for compensation be set apart before the entry and occupation. Still there must be an adequate provision for compensation, and a provision that the land should be paid for out of the earnings of a railroad which was owned by the commonwealth was held not to be adequate, although it was probable that such earnings would be sufficient. *Connecticut River Railroad Co. v. County Comrs.*, 127 Mass. 50. But in the case of land, if the landowner takes proper measures to have the compensation determined, and it is not ultimately paid, a court of equity would enjoin the company taking it from the further use of the land, and the owner could retake the land or enforce his lien upon it. "The power to take and the obligation to indemnify for the taking are inseparable." *Brickett v. Aqueduct Co.*, 142 Mass. 394; 8 N. E. Rep. 119; *Drury v. Rail-*

road Co., 127 Mass. 571; Cushman v. Smith, 34 Maine, 247; Riche v. Water Co., 75 Maine, 91. The statute authorizing the taking must contain some provision for obtaining adequate indemnity. It is not enough to leave the owner to his action at law for damages. "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation and a ready means of ascertaining the amount. Payment need not precede the seizure, but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay." *Haverhill Bridge Proprietors v. County Comrs.*, 103 Mass. 120; *Thacher v. Bridge Co.*, 18 Pick. 501. If this is true when the property taken is land, much more is it true when the property taken is consumed in the use, so that, if compensation is not ultimately paid, the owner has no remedy by taking back the property. When property is taken for a public use, and is consumed in the use, the provision for adequate compensation certainly ought to be more than a mere right of action against a private person or corporation with the risk of never obtaining satisfaction, and the compensation, when it is made, must be made in money. *Com. v. Peters*, 2 Mass. 125; *State v. Beackmo*, 8 Blackf. 246; *Butler v. Commissioners*, 39 N. J. Law, 665; *Vanhorne v. Dorrance*, 2 Dall. 304; *Cooley Const. Lim.* (6th ed.) 691, 694; *Lewis Em. Dom.* § 460. Under the statutes of this commonwealth the compensation assessed for the taking of land by a railroad ultimately assumes the form of a judgment at law which must be satisfied in money, and it is provided that a "warrant of distress or execution may issue to compel the payment thereof, with costs and interest, and all its right and authority to enter upon and use the land or property, except for making surveys, shall be suspended until such warrant or execution is satisfied." Pub. Stat. chap. 112, § 101. At common law a common carrier of passengers could demand prepayment of the fare before he could be compelled to receive and transport passengers. The fare demanded must be reasonable, and when it is established by statute this is a legislative determination of what is reasonable. A carrier can have no lien on the passenger to secure the payment of the fare, and must, of necessity, collect the fare in advance, or trust to the credit of the passenger or of some

other person. See *Railroad Co. v. Gage*, 12 Gray, 393; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Spofford v. Railroad Co.*, 128 Mass. 326. Although, by reason of the public nature of the employment, the legislature can establish the rates of fare to be demanded by common carriers of passengers, we do not see that they can be compelled ultimately to take in payment anything which any other person could not be compelled to take in payment of a service rendered or in discharge of a debt. If a debt had been once incurred it could not be discharged except by a payment in money, or by the satisfaction of an execution by a levy upon tangible property. Although there may be little or no practical difficulty between solvent railroads if they chose to obey the statute, yet in theory each ticket or part of a ticket surrendered by a passenger for transportation represents a separate cause of action against the railroad issuing it. There is no fund provided for the redemption of the ticket, and no tangible property on which there is a lien. The statute puts no limit upon the number of mileage tickets which any railroad may issue, or upon the time within which they must be used. It does not prohibit a railroad from selling them for less than twenty dollars each, although it must redeem them at that price. It is possible that a railroad in need of money might resort to enormous sales of such tickets as a mode of raising money, and that these tickets might remain outstanding, to be used on other roads indefinitely, and that many of them might be presented for redemption at some remote time in the future, when the railroad company issuing them might be unable to redeem them. If it be assumed that under the power to regulate the fares of common carriers of passengers the legislature can require the passengers to be carried before the fares have been actually paid in money, the security for the ultimate payment of the fares in money ought, we think, to be as certain as that required when private property is taken for public uses, and we are of opinion that this statute does not provide adequate security. The objection that the statute authorizes one railroad to make conditions concerning the transportation of passengers which must be performed by other railroads also seems to us valid. The objection is not that the legislature has itself attempted to declare the rights of passengers who have purchased mileage tickets. The legislature, by this statute, has not determined the conditions which shall

be incident to the carriage of passengers under these tickets ; nor has it left them to be determined by the railroad company transporting the passengers. One railroad is, in effect, authorized to make a contract for another, but the railroads are not in fact the agents of each other in issuing these tickets. It has been often said that the legislature cannot make a contract between two or more persons which they do not choose to make, although it may sometimes impose duties which can be enforced as if they arose from contract. Without denying the power of the legislature to determine the form of the contracts which common carriers of persons or merchandise must make concerning transportation, and without considering the authority of the legislature to delegate this power to a board of public officers, we are of opinion that this power cannot be delegated to private persons or corporations.

It is not necessary or practicable to attempt in these cases to determine just how far the legislature may go by way of regulating the business of railroad companies within the commonwealth, nor just where the limits of its power end, nor whether certain provisions of the statute, if taken alone, would be valid. The statute must be considered as a whole. The statute requires a railroad company to transport passengers, and to receive therefor tickets or coupons which merely give separate causes of action against another railroad company, and no security is provided that these tickets or coupons will be redeemed in money by the railroad company issuing them when presented for redemption, and they may be used for transportation long after they are issued. The company issuing tickets may impose upon other railroads duties and responsibilities in the carriage of passengers different from those it assumes towards passengers who purchase tickets of itself, and the tickets may be used indiscriminately upon all railroads within the commonwealth not excluded or exempted from the provisions of the statute, and are not confined to railroad companies engaged in transporting passengers in connection with the company issuing the tickets. The railroad commissioners may exercise their power of excluding a railroad company from the provisions of the statute in season to prevent loss from a failure of the company to redeem the tickets issued, or they may not. The rights of railroad companies ultimately to receive in money the fares of passengers ought not to depend upon the discretion

of the railroad commissioners, and, if the statute would be invalid but for this discretion, this provision would not make it valid.

Mr. Justice Lathrop and Mr. Justice Barker agree that the informations are rightfully brought by the attorney-general, and that the court has jurisdiction, and are of opinion that the necessary effect of the statute is to apply and appropriate individual property to the public use, without the owner's consent, and without legal provision for a reasonable compensation therefor; and for this reason they agree that the statute is void, without expressing an opinion upon the other matters discussed in this opinion. A majority of the court are of opinion that the petitions should be dismissed.

KNOWLTON, J. (dissenting). I concur in everything contained in the opinion of the chief justice, except the discussion of the two points on which the decision is made to turn, but I do not agree with him in that, and I do not think the statute unconstitutional. In the opinion the question whether the statute is void as impairing the obligation of contracts contained in the several charters under which the railroads were organized was somewhat considered, but not decided. In the view which I take of other parts of the case, it becomes necessary to consider this question further. I need not go over the ground traversed by the chief justice. It is obvious that the object of the Statutes of 1831, chapter 81 (R. S. chap. 44, § 23), was to prevent charters afterwards granted by the legislature from being held to be contracts; and all subsequent charters must be deemed to have been granted subject to that general law, except in cases where the legislature saw fit plainly to abrogate it. If a charter was afterwards granted which expressly professes to bind the commonwealth by a contract, doubtless the commonwealth is bound; but in interpreting subsequent charters this general law must be given effect so far as it can be without coming in direct conflict with express contracts, plainly intended as such by the legislature. If we assume that in some of the charters of railroad corporations now included in the Old Colony Railroad Company there was an express contract that the legislature should not reduce the fares and charges so as to leave an income of less than ten per cent on the cost of the railroad, and that the general law above cited does

not apply to these contracts so far as they have been executed on either side, it must still be held that the legislature could at any time amend or repeal these provisions of the charters so as to prevent future action on the faith of them, leaving them in effect only so far as rights had accrued by the execution of them. It would be very unreasonable to hold that by such a provision the legislature was bound for all time to allow rates and charges which would produce an income of ten per cent, not only on the cost of the railroad as first built and completed under the charter, but also on every extension, enlargement or improvement of it after it had been completed according to the original plan. By the Statutes of 1870 (chap. 325, § 1), re-enacted in the Statutes of 1874 (chap. 372, §§ 4, 174), which last sections are still in force, the legislature terminated the right of these railroad corporations to go on expending money and increasing the cost of their railroads under a contract which permitted them, without the possibility of legislative interference, to charge fares which would give them an income of ten per cent on the cost of the road, if such a right had previously existed. As I understand the report, the Old Colony Railroad Company did not contend at the hearing that the statute under consideration would reduce its income below ten per cent on the cost of the road at the time its right to build a road or to increase the cost of it under the provisions of the original charters was terminated by the Statutes of 1870. Moreover, I am of opinion that the Old Colony Railroad Company, by accepting the benefit of legislation, subject to general laws which gave the legislature the right to revise its fares, rates and charges, has lost the right, if it ever had it, to interpose the provisions of the original charters against a statute which assumes in a reasonable way to regulate or reduce its fares. In the suit against the Boston and Albany Railroad Company nothing appears in the record which opens this defense or requires considerations of the numerous statutes under which the corporation is acting. I am, therefore, of opinion that the petitions should not be dismissed on the ground that the statute impairs the obligation of contracts securing to the respondent immunity from reduction of fares.

The only grounds on which the statute is held unconstitutional

by the majority of the court are: First, that it seeks to compel the transportation of passengers by one railroad on the credit of another, to which the money for payment of the fare has been advanced by the purchaser of a mileage ticket; and, secondly, that a mileage ticket is to be "accepted and received for fare and passage" upon other railroads "under like conditions as upon the line or lines of the corporation issuing such ticket." The property of railroad corporations is devoted to a public use. The truth of this proposition is nowhere questioned. Such corporations may exercise the right of eminent domain by taking lands for their roads against the will of the owners. The business of providing highways and arranging conveniences to enable people easily to pass from place to place is a part of the public business which may be done by the state. If the state grants franchises and delegates the transaction of this business to corporations, it retains the right to regulate the business for the public good in any reasonable way. It may do this in the exercise of the police power, which is a power inherent in every well-ordered system of government. It is the power which is granted in terms to our legislature by article 4, chapter 1, of the Constitution of Massachusetts, which gives the general court full power and authority "from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and order thereof and the subjects of the same, and for the necessary support and defense of the government thereof," etc. Moreover, most of the charters of railroad corporations have been granted and accepted subject to a reserved right in the legislature to alter or repeal them. It is settled that this right to regulate the business of railroad corporations extends so far as to authorize the legislature to fix the rates and charges for the transportation of passengers and freight. The principle is established by decisions, not only of this court, and of the Supreme Court of the United States, but of courts in most of the other states. *Parker v. Railroad Co.*, 109 Mass. 506; *Chicago, etc., Ry. Co. v. Iowa*, 94 U. S. 155; *Peik v. Railway Co.*, 94 U. S. 164; *Munn v. Illinois*, 94 U. S. 113; *Rug-*

gles v. People of Illinois, 108 U. S. 526 ; 2 Sup. Ct. Rep. 832 ; Railway Co. v. Wellman, 143 U. S. 339 ; 12 Sup. Ct. Rep. 400 ; Budd v. New York, 143 U. S. 517 ; 12 Sup. Ct. Rep. 468 ; People v. Boston & A. R. Co., 70 N. Y. 569 ; People v. Budd, 117 N. Y. 1 ; 22 N. E. Rep. 670, 682 ; Chesapeake & P. Tel. Co. v. Baltimore & Ohio Tel. Co., 66 Md. 399-414 ; 7 Atl. Rep. 809 ; Lake Shore & M. S. Ry. Co. v. Cincinnati, S. & C. Ry. Co., 30 Ohio St. 604 ; Hockett v. State, 105 Ind. 250-258 ; 5 N. E. Rep. 178 ; Telephone Co. v. Bradbury, 106 Ind. 1 ; 5 N. E. Rep. 721 ; Central Union Tel. Co. v. State, 118 Ind. 194-207 ; 19 N. E. Rep. 604 ; Baker v. State, 54 Wis. 368-373 ; 12 N. W. Rep. 12 ; Nash v. Page, 80 Ky. 539-545 ; Mayor, etc., of Mobile v. Yuille, 3 Ala. 140 ; Stone v. Railroad Co., 62 Miss. 607-639. A minority of the justices of the Supreme Court of the United States dissent from decisions of the majority extending the doctrine to the regulation of charges for the use of grain elevators (Munn v. Illinois, 94 U. S. 113 ; Budd v. New York, 143 U. S. 517-549 ; 12 Sup. Ct. Rep. 468), making a distinction between what they consider a public use of property and a public interest in the use of property. But they agree with the majority that railroad corporations are subject to regulation. Mr. Justice Field, one of this minority, in giving the opinion of the court in Banking Co. v. Smith, 128 U. S. 174-179 ; 9 Sup. Ct. Rep. 47, says : " The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes of its creation, or, as Chief Justice Marshall expresses it, ' by which the character and properties of individuality ' are bestowed ' on a collective and changing body of men ' (Bank v. Billings, 4 Pet. 514-562), the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the state's right of eminent domain, that it may appropriate needed property — a right which can be exercised only for public purposes — and the obligation assumed by the acceptance of its charter to transport all persons and merchandise upon like conditions and upon reasonable rates, affected the property and employment with a public use ; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use is continuous, the power to regulate remains, and the regulation may extend not merely to provisions

for the security of passengers and freight and against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discrimination. This is not a new doctrine, but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government the better to secure the purposes to which the property is dedicated or devoted, affected with a public use." In *Budd v. New York*, 143 U. S. 517-549; 12 Sup. Ct. Rep. 468, Mr. Justice Brewer, another of this minority, says: "The use is public, because the public may create it, and the individual creating it is doing thereby, pro tanto, the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work, he is pro tanto doing the work of the state. He devotes his property to a public use. It does not lose the right to fix the price because an individual voluntarily undertakes to do the work." This is equivalent to saying — what is undoubtedly the law — that it does not lose the right to make any reasonable regulation for the benefit of the public in regard to the transaction of any or of all the railroad business in the state.

The legislature's determination of what is reasonable is also conclusive, subject only to the limitations that its enactment shall not conflict with any expressed or implied provisions of the Constitution, either of the state or the United States. I am not aware of anything in either Constitution which forbids the state in regulating the public business of transporting passengers within its borders, when the business is carried on by its own creatures, whose financial ability it is supposed to know, from requiring these corporations to issue tickets which, when paid for, shall be received for transportation on a line of railroad other than that issuing it, and which shall entitle the carrying railroad to receive its pay from the railroad which issued and sold the ticket. It seems to me plain that this is not within the express provision of our State Constitution which forbids the taking of private property without compensation, or for other than a public use. I think it is not a taking of property without due process of law within the meaning of that language in the Constitution of the United States, nor an interference with the right "of acquiring, possessing and protecting property" which is secured by the declaration of rights

in the Constitution of Massachusetts. It is merely a regulation of public business which the legislature has a right to regulate. Its apparent object is to promote the convenience of persons having occasion to travel on different railroads, and to reduce for them the cost of transportation. The risk of pecuniary loss to a corporation from carrying a passenger on the credit of another corporation to which the money has been advanced for carriage, instead of having payment at the time, is almost infinitesimal. In the first place, all railroad corporations are required to make annual reports to the commonwealth (Pub. Stat. chap. 112, § 81), and the legislature is presumed to know that all, or nearly all, of them are of ample financial ability, and that their obligation to pay a small debt is as good as that of any city or town in the state; secondly, if there are any now, or if hereafter there should be any, which are not financially sound, it would be the duty of the railroad commissioners, on application, to relieve all other corporations from the obligation to take their tickets. In the natural course of business there would be frequent settlements of accounts between the different railroads, as there are now, and the most that any railroad could owe another under this statute would be the difference between the cost of the other's mileage tickets held by itself and the cost of its own tickets held by the other, which would ordinarily be but a trifling sum. It would be impossible for any railroad to harm its neighbors by issuing and selling a large number of mileage tickets in the anticipation of becoming insolvent, for, if it were possible to sell them, the railroad commissioners, at any time, on application, would exclude it from the provision of the act, and other railroads could not afterwards be required to accept its mileage tickets, and the loss, if any, would fall on the purchasers of the tickets, whose contracts would be with it alone. The risk of loss from inability of one railroad to collect of another under mileage tickets taken from passengers seems to me too small to be seriously considered, and I regard the objections to the statute in this particular as theoretical and speculative, rather than substantial or practical. It is a matter of common knowledge that every railroad does business on the credit of other railroads to a much larger amount than would ever be done under a statute of this kind. But, suppose there is a possibility of trifling loss in a case which might arise under the statute, that

does not render the statute unconstitutional. The question is rather whether there is a probability of losses so large as to make such a requirement plainly unjust and unreasonable as an interference with "the right of acquiring, possessing and protecting property." I think nobody can contend that there is such a probability. Moreover, the very idea of the exercise of the police power necessarily implies a greater or less interference with the acquisition, use and enjoyment of property. *Sawyer v. Davis*, 136 Mass. 298; *Miller v. Horton*, 152 Mass. 540; 26 N. E. Rep. 100. Every statute affecting property, enacted in the exercise of this power, illustrates the proposition. The reduction by the legislature of fares upon railroads is an illustration which, in my opinion, touches much more closely the acquisition, possession and protection of property than does a requirement that railroads shall trust each other during short intervals for the payment of fares for which interchangable tickets have been taken. In determining whether the statute is so unreasonable as to be against common right, real conditions and probable results, and not remote possibilities, are to be considered. It will hardly be contended that every statute enacted for the regulation of the railroad business of the commonwealth which contemplates the giving of a short credit by one railroad company to another in the convenient transaction of their business is, for that reason, unconstitutional. There are many general and special laws which require railroads to render services, to furnish station accommodations, and permit the use of tracks, and the like, to another corporation for a reasonable compensation, to be agreed upon, or, in the absence of agreement, to be fixed by the railroad commissioners. In many cases it would be difficult, if not impracticable, to provide for these payments in advance, and some, at least, of the statutes seem to contemplate that payments will be made upon short credits, as the practice is, after the services are rendered or the benefits received. Pub. Stat. chap. 11, §§ 216-218; Stat. 1866, chap. 126; Stat. 1872, chap. 180; Stat. 1871, chap. 343. Some of these statutes require the payment of rent for the use of a station built and owned by one railroad and used by others. The rent must either be paid in advance, or there must be some credit for it; it could hardly be paid daily. A requirement that the rent should be paid in advance would be quite as

objectionable on constitutional grounds as a provision for a reasonable credit. The building might be destroyed, and the company that had paid rent in advance might get no equivalent for its payment. It seems to me that a regulation which may require a short credit for trifling sums, arising in the regular course of business between great corporations, most of which have property amounting to many millions of dollars in value is not, for that reason, unconstitutional.

Similar considerations apply to the objection that the tickets are to be received by the different railroads in the state under like conditions. It may be that in favor of the constitutionality of the law this language might be construed to mean something less than that the provisions of a contract in regard to the amount of baggage which may be carried, and the like, made by the railroad issuing the ticket, are to be applicable when the ticket is used on the railroad of another company; but if we assume in favor of the respondents that this is the meaning of the language, the difficulty does not seem to me to be great. In the first place, it is a familiar fact that upon railroads generally there is no such difference in their contracts as to create any practical difficulty in issuing tickets to be used over many different lines of connecting railroads. Everybody knows that one may buy, at any important railroad station in the state, a ticket to go thousands of miles over numerous railroads, whose owners will all receive the ticket under like terms and conditions. The reasonableness and constitutionality of the statute are to be determined in view of the existing facts in the management of railroad business, and not in view of the legal possibility that some corporation would insert in its mileage ticket an unusual or absurd provision. If such an unexpected event should occur, that would be a reason for the intervention of the railroad commissioners under the statute, to relieve other corporations by excluding or exempting the railroad from the provisions of the act, and it would be in the power of the legislature at the earliest opportunity to compel it to issue mileage tickets with reasonable provisions in regard to the transportation of baggage and other similar matters. No material harm could come to any person or corporation in the meantime. In view of the way in which railroad corporations do their business, which must be presumed to have been known to

the legislature, and which must be considered in passing upon the statute, this objection, like the other, seems to me speculative and theoretical, rather than real. The statute in these two particulars, which are now made the ground of objection to it, conforms to the well-known voluntary practice of railroad corporations in the transaction of similar business. These objections would seem to be removable by a provision that each corporation shall deposit with the state treasurer, or with some other responsible officer, a sufficient fund to guaranty the redemption of all mileage tickets issued by it, and by a requirement that all mileage tickets shall be in a form prescribed by the legislature; but, if the statute contained such provisions, is it probable that the people of the commonwealth or the railroad corporations would think it more reasonable, or better for practical operation, or more conducive to the best interests of the community? I am of opinion that the statute is a regulation of the business of the railroad corporations of the commonwealth, which does not involve such probable loss from carrying passengers on credit, or such practical difficulty from the terms and conditions on which tickets would be issued, as to be an interference with the rights of those who undertake to do this public business, and I, therefore, think the statute constitutional. I am authorized to say that Mr. Justice Holmes concurs in this opinion.

Railroad companies — interchangeable mileage tickets.— The statute passed upon in the foregoing case is entitled “An act to require railroad corporations to provide mileage tickets which shall be accepted for passage and fare upon all railroad lines in this commonwealth.” The act, which is not given in the report, is as follows:

“Sec. 1. Every railroad corporation operating within this commonwealth shall provide and have on sale, for twenty dollars, mileage tickets representing one thousand miles, which shall be accepted and received for fare and passage upon all railroad lines in this commonwealth, as well and under like conditions as upon the line or lines of the corporation issuing such ticket.

“Sec. 2. Such tickets or any part thereof shall be redeemed by each corporation issuing the same, upon presentation by any other railroad corporation.

“Sec. 3. On petition of any railroad corporation included within the provisions of this act, filed with the railroad commissioners, asking that it may be exempt, or that any other railroad be excluded from the provisions of this act, said commissioners may, in their discretion, exempt or exclude such railroad from the provisions of this act, if in their judgment the public welfare or the financial condition of the road require or demand it.” Acts of 1892, chap 889.

Similar statutes exist in regard to street railways in Boston. One, passed in 1878, provides as follows: "Package tickets issued by any street railway company in the usual form of tickets sold by it, and good for a fare not exceeding six cents upon its route from a point in the city of Boston to another point in said city, in a car run therein by said company, shall be received by any other street railway company for a passage between any two points in said city, in any car wherein a fare not exceeding six cents is receivable; and every such company shall once in each week redeem all such tickets issued by it and presented by any other such company by paying five cents for each ticket so presented." Acts Mass. 1878, chap. 136; Pub. Stats. 1882, chap. 113, § 46.

Another statute, in force since 1864, has provided that one street railway company might issue a check to a passenger which should be good on any connecting railway on the day of its issue in the hands of the original holder, enabling a passenger by means of one payment of a sum not exceeding eight cents and less than two fares to secure passage from one point to another over two railways forming a continuous line. Acts 1864, chap. 229, § 27; Acts 1871, chap. 381, § 36; Pub. Stats. 1882, chap. 113, § 47.

These statutes have been construed and applied in the following cases, but their validity was not brought in question: *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Cronin v. Highland Street R. Co.*, 144 Mass. 249. As to the regulation of the fares of street railways see *Booth on Street Railway Law*, section 233. As to the regulation of fares of railroads generally, see *Chicago, etc., R. Co. v. Minnesota*, 2 Am. R. R. & Corp. Rep. 564, and note. The principal case is reviewed and criticised in an article in 7 *Harvard Law Review*, page 356, entitled "The Interchangeable Mileage Case."

NEW YORK & N. E. R. Co. v. TOWN OF BRISTOL ET AL.

(Supreme Court of United States, February 5, 1894.)

1. RAILROAD COMPANIES. LEGISLATIVE CONTROL. ACT TO ABOLISH GRADE CROSSINGS. The Public Acts of Connecticut of 1889, chapter 220, authorizing the railroad commissioners to order any railroad company, if in their opinion its financial condition will warrant, to remove a dangerous grade crossing, which it has failed to remove as required by the act, is within the police power of the state.

2. RAILROAD COMPANY MAY BE COMPELLED TO BEAR ENTIRE EXPENSE OF CHANGE. Said act, in allowing the entire expense of the change to be imposed, in particular instances, on the railroad company, does not deny to it the equal protection of the laws, the statute being applicable to all railroad corporations alike.

3. SUCH AN ACT DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES. Imposing such expense on the company does not amount to a taking of property without due process of law, the mode provided for ascertain-

ing such result being suited to the nature of the case, and not merely arbitrary and capricious.

4. There is no impairment of the obligation of contracts by reason of the large expenditure required, and the effect thereof on the contracts of the company with holders of its securities, where its charter is subject to amendment by legislative power.

5. An adjudication of the highest court of a state that a law enacted in the exercise of the police power of the state is not within the constitutional inhibitions upon impairment of the obligation of contracts, or the deprivation of property without due process of law, or of the equal protection of the laws, will not be reversed by the Supreme Court of the United States upon general ideas of the requirements of natural justice, apart from the provisions of the Constitution involved.

IN error to the Supreme Court of Errors of the state of Connecticut.

By section 1 of an act of the legislature of Connecticut approved June 19, 1889, entitled "An act relating to grade crossings" (Pub. Laws Conn. 1889, chap. 220, p. 134), it was provided:

"The selectmen of any town, the mayor and common council of any city, the warden and burgesses of any borough within which a highway crosses or is crossed by a railroad, or the directors of any railroad company whose road crosses or is crossed by a highway, may bring their petition in writing to the railroad commissioners therein alleging that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing of a highway crossing and the substitution of another therefor, not at grade, or the removal of obstructions to the sight of such crossing, and praying that the same may be ordered; whereupon the railroad commissioners shall appoint a time and place for hearing the petition, and shall give such notice thereof as they judge reasonable to said petitioner, the railroad company, the municipalities in which such crossing is situated, and to the owners of the land adjoining such crossing and adjoining that part of the highway to be changed in grade; and after such notice and hearing, said commissioners shall determine what alterations, changes or removals, if any, shall be made and by whom done; and if the aforesaid petition is brought by the directors of any railroad company, or in behalf of any railroad company, they shall order the expense of such alterations or removals, including the damages to any person whose land is taken, and the special damages

which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway, in consequence of any change, alteration or removal ordered under the authority of this act, to be paid by the railroad company owning or operating the railroad in whose behalf the petition is brought; and in case said petition is brought by the selectmen of any town, the mayor and common council of any city, or the warden and burgesses of any borough, they may, if the highway affected by said determination was in existence when the railroad was constructed over it at grade, or if the layout of the highway was changed for the benefit of the railroad after the layout of the railroad, order an amount not exceeding one-quarter of the whole expense of such alteration, change or removal, including the damages, as aforesaid, to be paid by the town, city or borough in whose behalf the petition is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway; if, however, the highway affected by such order, last mentioned, has been constructed since the railroad which it crosses at grade, the railroad commissioners may order an amount not exceeding one-half of the whole expense of such alteration, change or removal, including the damages, as aforesaid, to be paid by the town, city or borough in whose behalf the application is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway. The directors of every railroad company which operates a railroad in this state shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in this state, which crossings, so to be removed, shall be those which in the opinion of said directors are among the most dangerous ones upon the lines operated by it, and if the directors of any railroad company fail so to do, the railroad commissioners shall, if in their opinion the financial condition of the company will warrant, order such crossing or crossings removed as in their opinion the said directors should have applied for the removal of under the above provisions, and the railroad commissioners in so doing shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor."

Section 2 related to alterations of highways, one-fourth of the expense of which was to be paid by the state. Appeal from any decision of the commissioners under the act was specifically provided for.

On September 2, 1890, the railroad commissioners of the state of Connecticut made an order reciting that whereas the directors of the New York and New England Railroad Company had failed to remove or apply for the removal during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad, and whereas, in their opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as "Main street," in the town of Bristol, and directing a hearing upon the matter, with notice to the railroad company, the town and the owners of land adjoining that portion of the highway. The hearing was had on several days, from September 24, 1890, to February 11, 1891; and the commissioners, being of opinion that the financial condition of the company warranted the order, and that public safety required it, ordered the crossing removed, and determined and directed the alterations, changes and removals to be made and done, and that they be executed by the railroad company at its sole expense, including damages occasioned thereby. The company appealed from this order to the Superior Court of the county of Hartford, the petition for appeal setting forth various grounds therefor, which, by voluntary amendment, and by direction of the court, were reduced to these:

"(1) On the 2d day of March, 1891, the railroad commissioners of this state made an order to said company, requiring the removal of the grade crossing of its railroad in Main street in the town of Bristol, a full copy of which, marked 'Exhibit A,' is to be annexed hereto and filed herewith.

"(1a) Said company is not, and at the date of said order was not, of sufficient ability to execute the work of making the changes required by said order; and its financial condition does not, and did not then, warrant the making of such an order."

"(11) Said company cannot meet the expenses of executing the said order of the railroad commissioners, and have enough income left to pay its fixed charges, including interest on its bonds issued as aforesaid and outstanding, and the dividends on its preferred

stock issued as aforesaid, and maintain its railroad in good and proper condition.

“(12) If the law under which the proceedings were had, as set forth in said order, justifies said order, then it and said law are void, as violating both the Constitution of the United States and the Constitution of the state of Connecticut, in that said order impairs the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making it impossible for said company to pay the interest on their bonds and dividends on their preferred stock as agreed between them and said company, and yet maintain and operate its railroad efficiently, and, further, in that it takes the property of said company without just compensation and without due process of law, and denies to it the equal protection of the laws.”

“(16) Said order, herein appealed from, was not an order necessary for the safety of the public.

“(17) Said order should have been so made, and proceedings leading up thereto had, if at all, under section 2 of the act of 1889, as that one-quarter of the expense of its execution should be paid by the state.”

Paragraph 1a was substituted for paragraphs 2 to 10, inclusive, struck out by the court as mere statements of evidence.

The court, upon hearing the parties — the evidence not being preserved in the record, but it appearing that evidence was adduced by the company as to its earnings, expenses and property — made findings of fact that the railroad company was of sufficient ability to execute, and that the financial condition of the company warranted, the order of the commissioners for the removal of the grade crossing in question; that the crossing was among the most dangerous upon the line of the railroad; and that the safety of the public required its removal, and affirmed the order appealed from. Thereupon the company prosecuted an appeal to the Supreme Court of Errors of Connecticut, and assigned various errors to the rulings of the Superior Court in amendment of the petition on appeal, and in the exclusion and admission of evidence, and afterwards amended its reasons for appeal by adding the following:

“(8) Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the

railroad commissioners, justified said order, instead of holding that it was no law, because contrary to the Constitution of this state, in that it takes the property of the plaintiff without just compensation and without due process of law.

“(9) Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the railroad commissioners, justified said order, and in, therefore, affirming said order and overruling the plaintiff’s claim that said statute was void as violating the Constitution of the United States, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making it impossible for said company to pay the interest on its bonds and dividends on its preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently ; and, further, in that it took the property of said company without due process of law and denied to it the equal protection of the law.

“(10) Because the court erred in overruling the claim of the plaintiff, in the twelfth paragraph of its petition of appeal, that said statute was void, and was no justification of said order, under the Constitution of the United States and the fourteenth amendment thereof.

“(11) Because the judgment does not meet the issues. There is no general finding of the issues against the plaintiff, and no finding as to issues raised in paragraphs 11 and 17.”

The Supreme Court of Errors of Connecticut decided that there was no error in the judgment appealed from (62 Conn. 527 ; 26 Atl. Rep. 122), and thereupon a writ of error was allowed to this court and errors assigned as follows :

“(1) The said court erred in holding that the statute under which were had the proceedings as set forth in the order of the railroad commissioners exemplified in the record of the case justified said order, and in affirming the judgment of the Superior Court in and for Hartford county, affirming said order, and in overruling plaintiff’s claim that said statute was void as violating the Constitution of the United States, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making it impossible for said company to pay the interest on its bonds and dividends on

its preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently ; and, further, in that it took the property of the company without due process of law, and denied to it the equal protection of the law.

“(2) The said court erred in overruling the claim of the plaintiff in error in the twelfth paragraph of its petition of appeal from the railroad commissioners to the Supreme Court, as set forth in the record, that said statute was void, and was no justification of said order, under the Constitution of the United States and the fourteenth amendment thereof.”

Chas. E. Perkins, for plaintiff. *John J. Jennings* and *H. C. Robinson*, for defendants.

FULLER, Ch. J. (*after stating the facts*). The reasons of appeal to the Supreme Court were filed October 7, 1892, and assigned errors in the action of the Superior Court in dealing with various paragraphs of the petition of appeal from the order of the railway commissioners, and in the admission and exclusion of evidence, but contained nothing questioning the constitutionality of the law under which the proceedings were had until they were amended, December 17, 1892, by adding the paragraphs raising that question. This tardiness in bringing the contention forward is perhaps not to be wondered at, in view of the repeated adjudications of the Supreme Court of Connecticut sustaining the constitutionality of similar laws, as well as of this particular statute, and of the rulings of this court in reference to like legislation.

A motion to dismiss the writ of error for want of jurisdiction is now made, and with it is united a motion to affirm on the ground, in the language of our rule (rule 6, par. 5), “that, although the record may show that this court has jurisdiction, it is manifest that the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.”

We agree with counsel that this court has jurisdiction, but are of opinion that the principles to be applied in its exercise are so well settled that further argument is not needed, and that, this being so, the jurisdiction may be said, under the circumstances, to rest on so narrow a foundation as to give color to the motion

to dismiss, and justify the disposal of the case on the motion to affirm.

It must be admitted that the act of June 19, 1889, is directed to the extinction of grade crossings, as a menace to public safety, and that it is, therefore, within the exercise of the police power of the state. And, as before stated, the constitutionality of similar prior statutes, as well as of that in question, tested by the provisions of the State and Federal Constitutions, has been repeatedly sustained by the courts of Connecticut. *Woodruff v. Catlin*, 54 Conn. 277; 6 Atl. Rep. 849; *Westbrook's Appeal*, 57 Conn. 95; 17 Atl. Rep. 368; *New York & N. E. R. Co.'s Appeal*, 58 Conn. 532; 20 Atl. Rep. 670; *Woodruff v. Railroad Co.*, 59 Conn. 63; 20 Atl. Rep. 17; *State's Attorney v. Selectmen of Branford*, 59 Conn. 402; 22 Atl. Rep. 336; *New York & N. E. R. Co. v. City of Waterbury*, 60 Conn. 1; 22 Atl. Rep. 439; *City of Middletown v. New York, etc., R. Co.*, 62 Conn. 492; 27 Atl. Rep. 119.

In *Woodruff v. Catlin*, the court, speaking through Pardee, J., said, in reference to a similar statute: "The act in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature, having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them, severally, to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; and may enforce obedience to its judgment. That the legislature of this state has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

And as to this act the court, in 58 Conn. 532; 20 Atl. Rep. 670, on this company's appeal, held that grade crossings were

in the nature of nuisances, which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all of the expense of such abatement.

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27; 5 Sup. Ct. Rep. 357; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 623; 8 Sup. Ct. Rep. 273; *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468. And also that "a power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close v. Glenwood Cemetery*, 107 U. S. 466, 476; 2 Sup. Ct. Rep. 267; *Waterworks v. Schottler*, 110 U. S. 347; 4 Sup. Ct. Rep. 48; *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson v. Jessup*, 15 Wall. 454.

The charter of this company was subject to the legislative power over it of amendment, alteration or repeal, specifically and under general law. 5 Priv. Laws Conn. 543, 547; 7 Sp. Laws Conn. 466; 8 Sp. Laws Conn. 353; Sp. Laws Conn. 1881, 64; Gen. Stats. 1875, 278; Gen. Stats. 1888, § 1909; *New York, etc., R. Co. v. City of Waterbury*, 60 Conn. 1; 22 Atl. Rep. 439.

The contention seems to be, however, that the legislature, in discharging the duty of the state to protect its citizens, has

authorized by the enactment in question that to be done which is, in certain particulars, so unreasonable and so obviously unjustified by the necessity invoked, as to bring the act within constitutional prohibitions.

The argument is that the existing grades of railroad crossings were legally established, in accordance with the then wishes of the people, but, with the increase in population, crossings formerly safe had become no longer so; that the highways were chiefly for the benefit of the local public, and it was the duty of the local municipal corporation to keep them safe; that this law applied to railroad corporations treatment never accorded to other citizens in allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on those companies, and in that respect, and in the exemption of the town from its just share of the burden, denied to them the equal protection of the laws.

And further that the order, and, therefore, the law which was held to authorize it, amounted to a taking of property without due process, in that it required the removal of tracks many feet from their present location, involving the destruction of much private property, the excavation of the principal highway, and those communicating, and the building of an expensive iron bridge, all at the sole expense, including damages, of the company, without a hearing as to the extent of the several responsibilities of the company and the town, or as to the expense of the removal of this dangerous crossing, as compared with other dangerous crossings, or of the degree of the responsibility of the company for the dangers existing at this particular crossing. The objection is not that hearing was not required and accorded, which it could not well be, in view of the protracted proceedings before the commissioners and the Superior Court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed, and that the particular crossing to be removed was authorized to be prejudged.

It is further objected that the Supreme Court had so construed the statute that, upon the issue whether the financial condition of the company warranted the order, no question of law could be raised as to the extent of the burdens which a certain amount of financial ability would warrant, and thus, in that aspect, by rea-

son of the large amount of expenditure which might be, and as matter of fact was, in this instance, required, the obligation of the contracts made by the company with the holders of its securities was impaired. Complaint is made in this connection of the striking out by the Superior Court of certain paragraphs of the petition on appeal, held by that court and the Supreme Court to plead mere matters of evidence, and the decision by the Supreme Court that all the material issues were met by the findings. Those issues were stated by the court to be whether or not the company's directors had removed, or applied for the removal of, a grade crossing, as required by the statute; whether or not the grade crossing ordered to be removed by the commissioners was in fact a dangerous one, which the directors ought to have removed, or for the removal of which the directors ought to have applied, and whether or not the company's financial condition was such as to warrant the order.

And upon these premises it is urged, in addition, that the right to amend the charter of the corporation was not controlling, because that did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them for purposes of management and control, under a corporate organization created by special law, was nevertheless private property, not by virtue of the charter, but "by force of the most fundamental and general laws of modern society, which, from their nature, necessarily protect alike and fully all legitimate acquisitions of the members of the community, no matter whether held by them as individuals or partnerships or associations or corporations."

The Supreme Court of Connecticut held that the statute operated as an amendment to the charters of the railroad corporations affected by it; that, as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that the statute was not unconstitutional, in authorizing the commissioners to determine their own jurisdiction, and that, besides, the right of appeal saved the railroad companies from any harm from their findings; that it was the settled policy of the state to abolish grade crossings as rapidly as could be reasonably done; and that all general laws and police regulations affecting corporations were binding upon them without their assent.

We are asked, upon the grounds above indicated, to adjudge that the highest tribunal of the state in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the state of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

But this court cannot proceed upon general ideas of the requirements of natural justice, apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

As observed by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, 104, the fourteenth amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." To use the language of Mr. Justice Field in *Railway Co. v. Humes*, 115 U. S. 512, 520; 6 Sup. Ct. Rep. 110, "it is hardly necessary to say that the hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity, and that the remedy for evils of that character is to be sought from state legislatures."

The conclusions of this court have been repeatedly announced, to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that, therefore, they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination, and no denial of the equal protection of the laws, in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due

process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. *Railway Co. v. Alabama*, 128 U. S. 96; 9 Sup. Ct. Rep. 28; *Banking Co. v. Smith*, 128 U. S. 174; 9 Sup. Ct. Rep. 47; *Railway Co. v. Beckwith*, 129 U. S. 26; 9 Sup. Ct. Rep. 207; *Dent v. West Virginia*, 129 U. S. 114; 9 Sup. Ct. Rep. 231; *Railroad Co. v. Gibbes*, 142 U. S. 386; 12 Sup. Ct. Rep. 255; *Railroad Co. v. Emmons*, 149 U. S. 364; 13 Sup. Ct. Rep. 870.

Judgment affirmed.*

Railroad companies — legislative control — compelling companies to make alterations, construct works or otherwise incur expense for the purpose of promoting the public health, convenience or safety.— Numerous authorities upon this subject are referred to in note to *American Rapid Tel. Co. v. Hess*, 4 Am. R. R. & Corp. Rep. 199. The Connecticut cases in regard to abolishing grade crossings are reviewed on pages 208 to 210 of the note. Railroad companies may be compelled to construct and maintain cattle guards and fences. *Minneapolis & St. L. R. Co. v. Emmons*, 7 Am. R. R. & Corp. Rep. 755; 8 Am. R. R. & Corp. Rep. 140, note 1; 4 Am. R. R. & Corp. Rep. 210, note. To construct and maintain stations at the intersections with other roads. 4 Am. R. R. & Corp. Rep. 210, note. To maintain flagmen at crossings. 7 Am. R. R. & Corp. Rep. 211, note; 6 Am. R. R. & Corp. Rep. 262, note 2. To maintain bulletin boards at stations, showing whether trains are on time or not. 7 Am. R. R. & Corp. Rep. 356, note 2. To provide separate and equal accommodations for the white and colored races. *Louisville, etc., R. Co. v. State of Mississippi*, 1 Am. R. R. & Corp. Rep. 724; *Ex parte Plessey*, 7 Am. R. R. & Corp. Rep. 383, and note. According to some courts they may be compelled to construct and repair highway crossings, even in cases of new streets. *State v. Railroad Co.*, 2 Am. R. R. & Corp. Rep. 664; *Chicago & N. W. R. Co. v. Chicago*, 4 Am. R. R. & Corp. Rep. 697. But this is denied by other courts as to new streets. *Kansas Central R. Co. v. Board of County Commissioners*, 4 Am. R. R. & Corp. Rep. 688; *Boston & Albany R. Co. v. Cambridge*, 8 Am. R. R. & Corp. Rep. 436. See, also, as bearing on the general subject, *South Covington, etc., Street R. Co. v. Berry*, 6 Am. R. R. & Corp. Rep. 258; *Sternberg v. State*, 7 Am. R. R. & Corp. Rep. 579, and note.

* Reported in 35 N. E. Rep. 252.

SEAWELL ET AL. V. KANSAS CITY, FT. S. & M. R. Co.

(Supreme Court of Missouri, Division No. 1, November 27, 1893.)

1. RAILROAD COMPANIES. INTERSTATE SHIPMENT. A shipment between two points in the same state is not interstate because a part of the track over which the shipment is made lies in another state.

2. DISCRIMINATION. LONG AND SHORT HAUL. The plaintiff shipped coal by defendant's road from Carbon Centre, on a branch, to Miami and thence to Kansas City, and paid a greater charge than the rates at the same time advertised for the transportation of coal from Liberal and Minden on the main line through Miami to Kansas City, a greater distance. Held, first, that whether the transportation was upon the same line, in the same direction and under similar circumstances and conditions was a question for the jury, and, second, that to make out a case of unlawful discrimination it was not necessary to show that any coal was actually shipped from Minden and Liberal on the same dates as plaintiff's shipments, since the defendant, in advertising certain rates from Minden and Liberal, must be deemed to have "charged" such rate within the meaning of the statute making it unlawful for a carrier "to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property, under similar circumstances and conditions, for a shorter than a longer distance over the same line in the same direction."

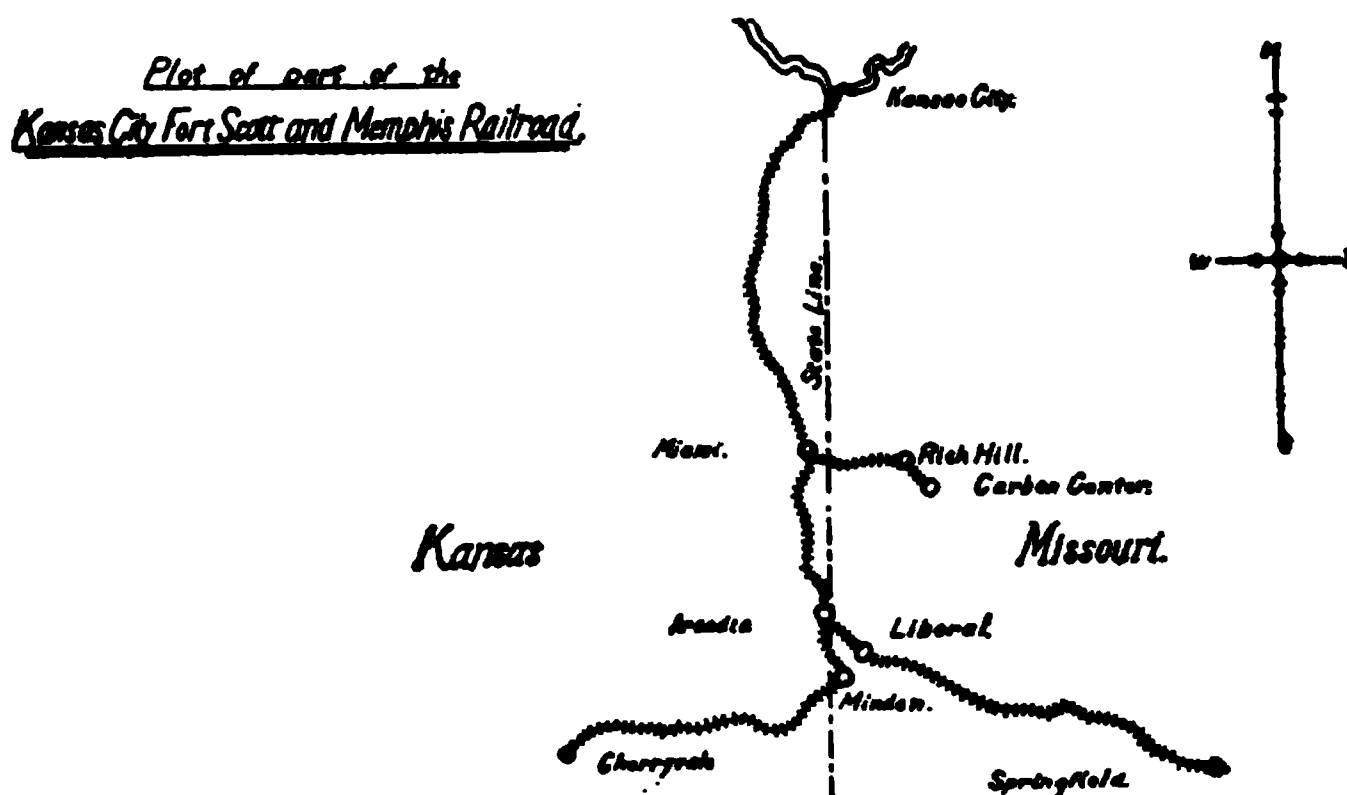
3. DAMAGES FOR UNJUST DISCRIMINATION. Where plaintiff had been charged more for a shorter than others were charged for a longer distance over the same line in the same direction, in violation of the above statute, he is entitled to recover the excess he has paid over the charge for the longer distance.

ACTION by J. M. Seawell and others against the Kansas City, Fort Scott and Memphis Railroad Company to recover damages sustained by reason of defendant's giving undue preference to other persons shipping freight over its line. From a judgment for plaintiffs defendant appeals.

Wallace Pratt and *I. P. Dana*, for appellant. *Gates & Wallace*, for respondents.

BRACE, J. By article 2, chapter 42, Revised Statutes of 1889, it is declared to be unlawful for any common carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality in the transportation of goods, wares and merchandise of any character, or to subject any particular person, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage

with respect to such transportation" (§ 2636), and "for any such common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property, under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction" (§ 2637), and it is therein further provided that, "in case any such common carrier shall do or cause to be done any act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act or thing in this act required to be done, then such common carrier shall be liable to the person or persons injured thereby for three times the amount of the damages sustained in consequence of the violation of the provisions of this act, together with a reasonable attorney's fee to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case" (§ 2643). The defendant is a corporation operating a line of railroad between Kansas City, Mo., and Memphis, Tenn., through the states of Missouri, Kansas and Arkansas. The following diagram of a part of its main line and branches is sufficient to fully illustrate the present controversy :



The gravamen of the plaintiffs' complaint is that during the months of April, May and part of June, 1890, the defendant company charged the plaintiffs two dollars more for the transportation of each of 150 cars of coal shipped to them at Kansas City, Mo., from Carbon Centre, than it charged at the same dates for transporting coal from Liberal and Minden, all being towns in the state of Missouri, on defendant's line of railroad, and the said

towns of Liberal and Minden being each at a greater distance from Kansas City than the said town of Carbon Centre.

The answer, in substance, is a general denial and a special plea that any coal carried by defendant from Carbon Centre to Kansas City was transported over a part of its road situated in Missouri and over a much longer portion in the state of Kansas, and the same was true of all freight carried by defendant from either Minden or Liberal to Kansas City (the distance being specified as to each place); that defendant's said lines of railroad were operated not only for the transportation of freight between said three places and Kansas City, but also between many other places on said line in the states of Missouri, Kansas and Arkansas, and that all freight transported from either of said three places to Kansas City was interstate commerce, and subject to regulation alone by congress, and not subject to said provisions of the laws of Missouri; and that said provisions of the Revised Statutes of Missouri are in violation of the Constitution of the United States, and are unconstitutional and void. It appeared from the evidence that the defendant charged the plaintiff, and that he paid, for transporting coal from Carbon Centre, two dollars per car more than during the same time were its charges for transporting coal from Liberal and Minden; that coal carried by defendant from Carbon Centre to Kansas City would run first about 20 miles in Missouri to the state line, then in Kansas about 81 miles, where it recrossed into Missouri, and ran 2 miles in that state, being an aggregate distance of about 103 miles; from Liberal to Kansas City, would first run about 7 miles in Missouri to the state line, then 115 miles in Kansas, and then 2 miles in Missouri, being an aggregate distance of 124 miles; and from Minden to Kansas City, would first run five miles in Missouri, then 122 miles in Kansas, and then 2 miles in Missouri, being an aggregate distance of 129 miles. On the trial the court refused to sustain some objections of the defendant to the plaintiffs' evidence, which will be noticed in the course of the opinion, and refused to sustain the defendant's demurrers to the plaintiffs' evidence. The defendant offered no evidence. The issues were submitted to the jury upon two instructions for the plaintiffs and seven for the defendant, and the jury returned a verdict for plaintiffs for \$274. Thereupon, on application of plaintiffs, the court trebled said amount,

rendered judgment for plaintiffs for \$822 and costs, and taxed as part of such costs an attorney's fee of \$250. The defendant brings the case here by appeal.

1. The first error assigned is that the trial court refused to nonsuit the plaintiffs on the evidence. To sustain this assignment it is necessary, and counsel for the defendant undertake, to maintain the proposition that, although it be conceded that Carbon Centre, Liberal and Minden are all in Missouri, upon the line of defendant's railroad, the transportation by defendant of coal from all three of these points to Kansas City, also in the state of Missouri, is in the same direction, over the same line of railroad, and under similar circumstances and conditions; that the distance from Liberal and Minden to Kansas City is greater than from Carbon Centre; and that the defendant charged the plaintiffs in the aggregate more for transporting plaintiffs' coal from Carbon Centre than it charged from either of the other two points to said city — yet the plaintiffs cannot recover, although the statutes of Missouri give plaintiffs a right of action for damages for such discrimination charges against them between places on the line of defendant's road in this state, because defendant's line of road between these points being partly in the state of Kansas, and the transportation of coal between these points thereon being partly through the state of Kansas, such transportation is "commerce among the several states," within the meaning of section 8, article 1, of the Constitution of the United States, and subject to regulation alone by congress, and as to such commerce the state statutes aforesaid are inoperative and void. There can be no question that the foregoing legislation of Missouri is part of a system adopted in this state for the purpose, and having the effect of regulating that important branch of commerce conducted by railroads. In the same year in which it was first adopted the congress of the United States adopted a general law regulating "commerce." The law of congress was approved February 4, 1887, and went into effect sixty days after its passage. 24 Stat. 379, chap. 104. The federal statute, enacted for the purpose of regulating "commerce among the states," passed under the power given congress by the Constitution, defines and applies the provisions of the act to such commerce when conducted by railroads

on land in the following language: "The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or hauling of property wholly within one state, and not shipped to or from * * * any state or territory as aforesaid." Within six months thereafter the legislature of Missouri passed the law in question, approved July 5, 1887 (Laws Mo. Ex. Sess. 1887, p. 16, § 3; Ibid. p. 17, § 4; Ibid. p. 20, § 10), which seem, to have been in great measure copied from sections 3, 4 and 8 of the federal act. It goes without saying that the latter was intended to regulate interstate commerce only, and the former state or domestic commerce only. In the latter we have a general definition by congress of interstate commerce, and while the Missouri statute does not in terms undertake to define state commerce generally, it does do so, so far as the instance in hand is concerned, by declaring in section 2656 of the same act (R. S. 1889) that all the provisions of that act "shall be held to apply to shipments made from any point within the state, whether the transportation of the same shall be wholly within this state or partly within this and an adjoining state or states." These definitions are important only for the purpose of showing the opinion of congress and of the legislature upon the question of what constitutes interstate, as distinguished from state, commerce, so far as the present inquiry is concerned; for it will be conceded without argument or the citation of authorities that the jurisdiction of each within its legitimate legislative domain is as potent and exclusive as the other; and these provisions are respectively adverted to only for the reason that it is suggested that this section of the Missouri statute is in conflict with the federal statute, and that the wording of section 1 of the national statute gives support to the contention that this declaration of the legislature trenches upon the power of congress over interstate commerce in the opinion of the national legislature as therein manifested. We confess our inability to see any conflict or

inconsistency in the terms of these two laws. By the one congress undertakes to regulate the business of a common carrier by railroad only when engaged in the transportation of freight from one state to another. This is the positive enactment, and its scope is not enlarged by the proviso, the office of which is not to enlarge, but to limit and restrict, the language of the lawmaker. End. Interp. Stat. p. 254, § 184. By the other the legislature of Missouri does not undertake to regulate such business, but only the business of a common carrier when engaged in the transportation of freight from one to another point in Missouri, i. e., from a point in one state to another point in the same state. From this legislation by congress and the legislature no light is shed upon the question whether the state in so doing can regulate such business, and to what extent, when the line of transportation between such points is partly within and partly without the boundaries of the state, as in the present case. For its solution we will have to look to the constitutional provision, and the construction placed upon it by the Supreme Court of the United States, the only tribunal that can authoritatively and finally settle it. If the declaration of the state legislature upon the subject be in contravention of the right of congress to regulate interstate commerce as construed by that court, it must necessarily be futile as to the case in hand. The legislation of congress has not changed the grounds upon which it must be held or overthrown.

In support of their proposition, counsel for appellant cite us to several declarations of the Supreme Court of the United States, all of which have been examined, as well as such others as seemed to bear upon the question, from the great case of *Gibbons v. Ogden*, 9 Wheat. 1, to the late case of *Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192; 12 Sup. Ct. Rep. 806, inclusive; and while, in the opinions of the judges, expressions may be found tending to support the defendant's position, such as are quoted in the brief of its counsel, we have found no case in which the question in this case was in judgment, necessarily involved in the principle decided, or strictly analogous to it, unless it be the last. We have not time, nor would it be profitable, to review these cases. It is sufficient to say of those cited that the cases of *Welton v. Missouri*, 91 U. S. 275, and *Railroad Co. v. Husen*, 95 U. S. 465, are not at all analogous to the case in hand. That in *The Daniel Ball*, 10

Wall. 557, the cases of *Hall v. De Cuir*, 95 U. S. 485; *Lord v. Steamship Co.*, 102 U. S. 541, and *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct. Rep. 826 — in judgment go no further than to decide that it is not within the power of a state bordering on the ocean, the navigable lakes or rivers of the country, to regulate commerce thereon between points even within its own borders. From the beginning the Supreme Court of the United States has consistently maintained, upon varied lines of reasoning, that the regulation of commerce in such waters upon which may freely float the vessels not only of the citizens of different states, but of foreign countries, is a matter of national concern, and within the exclusive jurisdiction of congress. In the case of *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep. 4, a majority of the court held, in an opinion written by Justice Miller, that while a statute of that state, which prohibited any railroad company within that state from charging or receiving for transportation of passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, may include and be valid as to a transportation of goods which is begun and ended within the limits of the state, disconnected from a continuous transportation through or into other states — as, for instance, from Chicago to Alton, or from Cairo to Chicago — yet such legislation is obnoxious to the constitutional provision when attempted to be applied to a continuous transportation from one state through a number of states to another state — in the case then in hand from points in Illinois to the city of New York — even as to the distance within the limits of the state of Illinois. In a dissenting opinion, delivered by Chief Justice Waite, in which Bradley and Gray, JJ., concurred, after stating the question to be whether “a state legislature has the power to regulate the charges made by railroads of the state for transporting goods and passengers to and from places within the state when such goods or passengers are brought from or carried to points without the state, and are, therefore, in the course of transportation from another or to another state,” and the contention “that such transportation is commerce between or among different states and the power does not exist,” and that the majority of the court so held, the learned chief justice says for himself and associates in the opinion: “We feel obliged to dis-

sent from that opinion. We think that the state does not lose its power to regulate the charges of its own railroads in its own territory simply because the goods or persons transported have been brought from or are destined to a point beyond the state in another state." Whatever may be thought of the relative merits of the reasoning in the two opinions, with which we have no concern, as our course must be guided by the ruling of the majority of the court, this much must be conceded, that the distinction between the case there in hand and cognate cases, such as *Munn v. Illinois*, 94 U. S. 113, and *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, in both of which the opinions of the court were written by Chief Justice Waite, and the cases of *Hall v. De Cuir*, *The Daniel Ball*, *Lord v. Steamship Co.* and *Gloucester Ferry Co. v. Pennsylvania*, *supra*, and cases of that class, is therein clearly stated by the same chief justice, who wrote the opinions also in the cases of *Hall v. De Cuir* and *Lord v. Steamship Co.*, in the following language: "The distinction here taken seems to us sound, and to distinguish the present case from that of *De Cuir*. In the *Peik* case and others of like character the state regulated the charges upon an instrument of commerce [a railroad] situated within the state, and under its jurisdiction, such charges being made by virtue of the state authority. In the *De Cuir* case it attempted, as the law operated, to regulate the manner of carrying passengers on an instrument of commerce having no fixed location, but plying on navigable waters within and without the state; in other words, it attempted to regulate interstate commerce itself directly in a matter in which it had no special prerogative." This distinction is important in this inquiry only for the purpose of showing that the ruling in those cases where a state has undertaken to regulate commerce between points within its own boundaries, when conducted upon the navigable waters of the United States, for which purpose such waters are "the public property of the nation, and subject to all the requisite legislation of congress" (*Gilman v. Philadelphia*, 3 Wall. 724), are not analogous to cases of transportation between points within a state conducted by a carrier on its own road, and consequently are not in point in the case under consideration, as they were not in the *Wabash* case. The distinction between the latter case and the one in hand is evident on its face. There it was

attempted to regulate continuous transportation by rail between points in the state of Illinois and a point in the state of New York, and the court ruled that such transportation was interstate commerce. Here the state of Missouri has undertaken to regulate transportation by rail between points in the state only, and the Supreme Court of the United States has never held that this was interstate commerce, even where such continuous transportation was partly through the limits of another state, but to the contrary.

In *Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192; 12 Sup. Ct. Rep. 806, in which the state of Pennsylvania undertook, under the laws of that state, to collect a tax upon the earnings of a railroad company for transportation upon its road, which ran for a part of the distance in the state of New Jersey, the case was disposed of by the Supreme Court of Pennsylvania in a *per curiam* opinion, in which it was stated "that the single question presented was whether transportation from one point to another point in the same state is interstate commerce, for the reason that in the course of such transportation the property in question passes the boundaries of the state. The same point was before us last year, and we determined it in favor of the commonwealth. We adhere to the same ruling now, which will enable the cases to be reviewed by the Supreme Court of the United States, and our decision corrected if erroneous." 129 Penn. St. 308; 18 Atl. Rep. 125. An appeal to the Supreme Court of the United States was taken in that and the three other cases, and the decision of the Supreme Court of Pennsylvania in each sustained in an opinion delivered by Chief Justice Fuller, to which there was no dissent; in which, after holding that taxation "is undoubtedly one of the forms of regulation," the question is stated and decided in language as follows: "The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the state, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another state than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points, and not

between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate because in its accomplishment some portion of another state may be traversed? * * * It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." It would seem that this ruling is directly in point in the present case, when it is remembered that the question here is not as to the power of any other state than the state of the termini, nor as to the regulation of the operations of the defendant or any other company's road elsewhere than in Missouri; for by its terms this statute can only operate between points in the state of Missouri on the same line of railroad transporting "like kinds of property under similar circumstances and conditions." Regarding this last decision of the Supreme Court of the United States as decisive of the question under consideration, we deem it unnecessary to notice the other authorities cited by counsel for appellant upon this point, further than to say that we think that the case in hand can as readily be distinguished from the cases of *State v. Chicago, St. P., M. & O. Ry. Co.*, 40 Minn. 267; 41 N. W. Rep. 1047, and *Hardy v. Railway Co.*, 32 Kans. 698; 5 Pac. Rep. 6, and the cases cited from the decision of the interstate commerce commission, as it can from those cases of which the *Wabash* case and *Lord v. Steamship Co.*, *supra*, are representatives. The trial court committed no error in refusing the nonsuit.

2. The following are the instructions given to the jury in behalf of the plaintiffs: "(1) The court instructs the jury that if they believe from the evidence that there was shipped to the plaintiffs at the dates stated in the different counts of the plaintiffs' petition, from the town of Carbon Centre, Missouri, to

Kansas City, Missouri, certain cars of coal, on which the defendant charged and received from the plaintiffs as compensation for carrying the same a sum greater in the aggregate than defendant charged at the same date for the transportation of a like kind of property under similar circumstances and conditions from the town of Liberal, Missouri, or from the town of Minden, Missouri, to said Kansas City, Missouri, and that it was a longer distance over the line of the defendant's road in the same direction from said towns of Liberal and Minden to said Kansas City, Missouri, than it is from the town of Carbon Centre, and thereby gave an undue and unreasonable preference and advantage to the town of Liberal or to the town of Minden as against and to the disadvantage of the said locality of Carbon Centre, then you will find for the plaintiffs. And the court instructs the jury that it is not necessary that any coal should have actually been shipped on the railroad of the defendant to Kansas City from the said towns of Minden or Liberal on the dates on which plaintiffs shipped coal over the defendant's railroad from Carbon Centre; but if you find from the evidence that the defendant published and held out to the public at said times that certain rates or amounts would be claimed for the shipment of such merchandise from said points to Kansas City, Missouri, then the defendant is deemed to have charged said rate within the meaning of the law. (2) If the jury find for the plaintiffs they will assess their damages on each count of the plaintiffs' petition at the amount which they may believe from the evidence has been charged and received by the defendant for the shipments set out in the plaintiffs' petition over and above like kinds of property under similar circumstances and conditions from the towns of Liberal and Minden." Sections 2637, 2643, *supra*, gave plaintiffs a right of action for any damage they may have suffered by reason of the defendant having charged and received from them a greater compensation for transporting their coal from Carbon Centre to Kansas City than it charged or received for transporting coal under similar circumstances and conditions over the same line from Liberal or Minden. All the facts necessary to constitute plaintiffs' cause of action under those sections are predicated in the first paragraph of instruction No. 1; that following the wording of the petition. That the instruction went further, and

unnecessarily required the jury to find that the defendant "thereby gave an undue and unreasonable advantage," etc., cannot afford the defendant any ground of complaint. It was simply requiring the jury to find more than was absolutely necessary for them to find in order for plaintiffs to recover. It was an error against them, and not against the defendant. It could in fact do no harm to anybody. The plaintiffs' right and the defendant's liability by reason of its acts, as hypothecated in the instruction and stated in the petition, giving plaintiffs a complete right of action under section 2637, are in no way impaired or changed by the fact that they also make a case within the terms of section 2636, stated as a deduction in the petition, and evident upon the face of the facts therein stated. The defendant might, if it had been so disposed, had this deduction stricken out of the petition as surplusage, instead of at the trial asking and receiving an instruction upon the same theory; and as such it may be rejected in the instructions, and plaintiffs' cause of action remain unchanged and complete. Its introduction in the petition required no other or different evidence than that which sustained plaintiffs' cause of action under section 2637.

3. It is contended for the defendant that the plaintiffs cannot recover upon the facts hypothetically stated in the first paragraph of instruction No. 1, unless it also appear that during the time plaintiffs' coal was being transported from Carbon Centre coal was also actually being transported from the towns of Minden and Liberal, and, therefore, that the second paragraph of that instruction is wrong. The statute says: "It shall be unlawful to charge or receive any greater compensation," etc.; and it is argued that, unless the company was actually transporting coal from Minden and Liberal to Kansas City at rates discriminating against Carbon Centre during the time it was transporting plaintiffs' coal from the latter place, the plaintiffs could receive no damage from such discrimination, and the company could not have made any such discriminative charges as to them. This objection seems to us only plausible. It will be observed that the discrimination prohibited is in either charging or receiving, and it is between localities, not persons. Persons may be the sufferers, and entitled to damages for the unlawful act, but the unlawful act consists in dis-

criminating against the locality. Now, the undisputed evidence is that before, during the time, and after plaintiff's coal was being shipped, the rates discriminating against Carbon Centre were published and held out to the world as the rates at which coal would be transported by the company to Kansas City, and that whenever coal was shipped from those points it was shipped at those rates. This evidence established the unlawful act discriminating against the locality. The plaintiffs failed to prove actual shipments from either Liberal or Minden during the months in which their coal was being transported, but did prove actual shipments from one or both of those points before and afterwards. This tended to show that they were damaged, for their damage would be the same in having to compete in their own market with coal received from these points at reduced rates, whether it got there before, at the time, or soon after their coal reached there. If this view be correct, then the court committed no error in overruling the objections to this evidence and in giving the second paragraph of said instruction, and we so hold. Instruction No. 1 is further criticised because the question of damage is omitted therefrom. This branch of the subject was fully covered, however, in the next instruction, and in No. 5 for defendant. Of the latter, defendant, of course, does not complain; and, if the former is correct, there will have been no error found in either of plaintiffs' instructions calling for a reversal of the judgment.

4. The question whether the transportation of coal by defendant from Liberal, Minden and Carbon Centre to Kansas City, Mo., was upon the same line, in the same direction, and under similar circumstances and conditions, was a question for the jury, as well as whether the defendant's charges for such transportation were greater for the shorter haul from Carbon Centre than for the longer haul from Liberal and Minden. These questions were submitted to the jury on proper instructions, and all found for the plaintiffs. There was no question but that the amount of the excessive charge was two dollars per car, and they so found, and assessed the plaintiffs' damages accordingly, as they were required to do by the second instruction. Was this measure of damages correct? In *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680; 13 Sup. Ct. Rep. 970, under an act of the legislature of Colorado of the same nature as the Missouri act and the Interstate Com-

merce Act, where it was shown by the plaintiffs' evidence that another shipper of coal, similarly circumstanced as to place and distance with the plaintiffs, had been receiving from the defendant railroad company a rebate upon all coal transported, which was not allowed to them, it was held "that the damages sustained by the plaintiffs" should be measured "by the amount of such rebate," and that "the question whether they lost profits upon the sale of their coal by reason of the non-allowance of such rebate was too remote to be made an element of damages." "They were entitled to the same terms which the Marshall Company would have received, and damages to the exact extent to which the Marshall Company was given a preference." The plaintiffs here, under the facts as found by the jury, were entitled to at least as good rates from Carbon Centre as were given to shippers from Liberal and Minden; and, in the absence of any evidence to the contrary, why should not their damages be measured by the exact extent to which shippers from the latter points were given a preference? We cannot see any other practical standard by which their damages could be measured, or that this instruction was erroneous. If our view of the law of this case be correct, the case was properly one for a jury, was fairly submitted to them by proper instructions on legal evidence, and there is no reason why the verdict should be set aside. This brings us to the judgment.

5. Under the law, the court trebled the damages found by the jury, and rendered judgment therefor, took evidence as to the value of attorneys' services in the case, assessed the value of such services at \$250, taxed the same as costs, and rendered judgment for that amount also. Exception is taken to the action of the court in assessing the attorneys' fee, but, as plaintiffs concede error in this respect, and remit that amount of the judgment in this court, this question need not be considered. Such remittitur will be entered, and the judgment affirmed, and the costs of this court taxed against the respondents. All concur, except Barclay, J., absent.*

COMMON LAW — REMEDIES FOR UNJUST DISCRIMINATION.

1. **Common carriers are entitled to charge a reasonable compensation and no more.**—This is one of the unquestioned principles of the

* Reported in 24 S. W. Rep. 1002.

common law, which has been regarded as settled for more than 200 years. See cases cited in 8 Am. R. R. Corp. Rep. 722, note: also Kansas Pacific Ry. Co. v. Bayles, *post*, p. 680; Illinois Central R. Co. v. People, 121 Ill. 304; Cook v. Chicago, etc., R. Co., (Iowa) 3 Am. R. R. & Corp. Rep. 550; New England Express Co. v. Maine Central R. Co., 57 Maine, 188; Avinger v. South Carolina R. Co., 29 S. C. 265.

2. Any sum exacted and paid in excess of a reasonable charge may be recovered back in an action for money had and received.— This, as a general proposition, is as well established as the one stated in the last section, though there is some difference of opinion as to what constitutes a voluntary payment of such excessive charges and as to what is sufficient *prima facie* evidence of unreasonableness. Among numerous cases in which the general rule is expressly affirmed are the following: Cowden v. Pacific Coast S. S. Co., 94 Cal. 470; 29 Pac. Rep. 873; Lafayette, etc., R. Co. v. Pattison, 41 Ind. 312; Louisville, etc., R. Co. v. Wilson, 132 Ind. 517; 32 N. E. Rep. 311; Cook v. Chicago, etc., R. Co., 81 Iowa, 551; 3 Am. R. R. & Corp. Rep. 550, Seawell v. Kansas City, etc., R. Co., (Mo.) 24 S. W. Rep. 1002; State ex rel., etc., v. Cincinnati, etc., R. Co., 47 Ohio St. 180; 2 Am. R. R. & Corp. Rep. 106; Brundred v. Rice, 49 Ohio St. 640; 7 Am. R. R. & Corp. Rep. 357; Twells v. Pennsylvania R. Co., (Penn.) 3 Am. L. Reg. (N. S.) 728, Borda v. Philadelphia, etc., R. Co., 141 Penn. St. 484; Hays v. Pennsylvania R. Co., 12 Fed. Rep. 309; Kinsley v. Buffalo, etc., R. Co., 37 Fed. Rep. 181; Crouch v. London & N. W. R. Co., 2 Carr & Kir. 789; Garton v. Bristol & Exeter R. Co., 1 B. & S. 112; 101 E. C. L. R. 112; Parker v. Great Western R. Co., 11 C. B. 545; 78 E. C. L. R. 545; Piddington v. South Eastern R. Co., 5 C. B. (N. S.) 111; 94 E. C. L. R. 111; Baxendale v. Great Western R. Co., 14 C. B. (N. S.) 1; 108 E. C. L. R. 1; S. C. on appeal, 16 C. B. (N. S.) 137; 111 E. C. L. R. 137; Sutton v. South Eastern R. Co., L. R., 1 Exch. 32; Baxendale v. London & S. W. R. Co., L. R., 1 Exch. 137; Sutton v. Great Western R. Co., 3 H. & C. 800; Great Western R. Co. v. Sutton, L. R., 4 Eng. & I. App. 226. affirming last case; Baxendale v. London & S. W. R. Co., 4 H. & C. 130; Lancashire & Yorkshire R. Co. v. Gidlow, L. R., 7 Eng. & I. App. 517; Parker v. Great Western R. Co., 3 Eng. Ry. & C. Cases, 563; Budd v. London & N. W. R. Co., 36 L. T. (N. S.) 802; 4 Ry. & Can. Traffic Cas. 393; Brown v. Great Western R. Co., 9 Q. B. D. 744; Evershed v. London & N. W. R. Co., 2 Q. B. 254; S. C. on appeal, 3 Q. B. D. 134; in House of Lords, 3 H. L. App. Cas. 1029.

3. If discriminative charges are unreasonable in amount, an action lies to recover back the excess over a reasonable sum.— This proposition follows necessarily from the one stated in the last section. In such case the action is not founded upon the discrimination but upon the unreasonable charge. The fact that others have been charged less than the plaintiff is only evidence to show that the plaintiff's charge is unreasonable. See the succeeding sections.

4. Whether an action lies to recover back any portion of a discriminative charge where the same is not unreasonable in itself — effect of the rule of equality.— The rule that the charges of a common carrier must be reasonable means, as applied by the courts, that the charge in any case must

be a reasonable compensation for the service rendered in view of all the circumstances and conditions under which it is rendered, and not that it must be reasonable as compared with what is charged for the same service in other cases, or for similar services. The fact that a carrier charges one person more than another for the same service is evidence tending to show that the greater charge is unreasonable and excessive, and, if unexplained, will justify a verdict to that effect. See next section. But the fact that a carrier charges one person more than another for the same service does not necessarily render the greater charge unreasonable in the common-law sense, and the question arises whether, if it is not unreasonable in itself, an action will lie to recover back the excess paid over the less charge, or any part of such excess. If the greater charge is reasonable and the carrier is under no obligation to charge all equally, then it is very clear that the carrier has not violated any duty and that no such action will lie to recover back such excess. A few cases in this country hold that the common law does not require carriers to charge equally, and the same courts have also necessarily held that, in case of discriminative charges, no action will lie to recover back any part of the greater charge, unless it is alleged and proved that it is unreasonable and extortionate. *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470; 29 Pac. Rep. 873; *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Ex parte Benson*, 18 S. C. 38. See, also, as favoring the same view, *Boston & Me. R. Co.*, 128 Mass. 326; *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1. For a review of these cases see 8 Am. R. R. & Corp. Rep. 703, 705, 709, 710, 717, 721.

But the majority of the courts hold, and the correct doctrine undoubtedly is, that common carriers are under a common-law obligation to charge *equally* as well as reasonably. 8 Am. R. R. & Corp. Rep. 700, 721-727. This is also the rule established by the Interstate Commerce Act and by many state statutes. The question, then, is, whether in jurisdictions where the rule of equality prevails, either by force of the common law or statute, an action will lie to recover the difference between a greater and a less charge for the same or a like service, or any part of such difference, without proof that the greater charge is unreasonable in itself. The case of *Cook v. Chicago, etc., R. Co.*, 81 Iowa, 551; 3 Am. R. R. & Corp. Rep. 550, is to the effect that such an action will not lie. In that case the court, while recognizing the rule of equality, held that the smaller charge was only evidence to show that the greater was unreasonable, and that the right of recovery was based upon the greater charge being unreasonable and extortionate. In *Fagan v. Aiken*, 9 Lea, 609, which was a similar suit, a recovery was denied, because the court held that no unjust discrimination was proven. See, also, *Houston, etc., R. Co. v. Rust*, 58 Tex. 98; *Kinsley v. Buffalo, etc., R. Co.*, 37 Fed. Rep. 181; *Hayes v. Pennsylvania R. Co.*, 12 Fed. Rep. 309.

The English authorities, however, hold that the statutory obligation to charge *equally* renders a greater charge for a like service necessarily extortionate to the extent of the excess over the less charge, and that an action for money had and received will lie to recover such excess, irrespective of whether the greater is reasonable in the common-law sense of that term. This was definitely settled in the case of *Great Western R. Co. v. Sutton*, L. R., 4 Eng.

& I. App. 226 (1868). Upon the point in question Mr. Justice Blackburn says: "I think it appears from the preamble of the ninetieth section of the Railway Clauses Consolidation Act, 1845, that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impress an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And if this be borne in mind I think the construction of the proviso for equality is clear, and is, that the defendants may, subject to the limitations in their special act, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable

"The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and, therefore, extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be necessary to show that there was a practice of carrying for some person or class of persons at the lower rate. But a single instance would be evidence to prove this practice; and if followed up by showing that the smaller charge was repeatedly made at intervals over a period of time, the jurors would, in the absence of explanation, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at the lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality."

And in the same case Lord Chelmsford said: "The last subject to be considered is the form of the action; whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff's goods, not absolutely, but relatively to the charges made to other persons. It is argued for the defendants that the charge upon the plaintiff's packed parcels being warranted by the act 10 & 11 Vict. chap. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that the fact of their having

been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge. The very fact of the smaller charge to others is the ground of his complaint of an overcharge to himself. Now, if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, or he was compelled to pay the amount demanded, and could not otherwise have his goods carried, the case falls within the principle of several decided cases, in which it has been held that money which a party has been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received." Pp. 262, 263.

This view was in accordance with the following prior decisions, all of which were reviewed and approved: *Parker v. Great Western R. R. Co.*, 7 M. & G. 253 (1844); *Parker v. Great Western R. Co.*, 11 C. B. 545 (1851); *Edwards v. Great Western R. Co.*, 11 C. B. 647 (1851); *Piddington v. South Eastern R. Co.*, 5 C. B. (N. S.) 111 (1858); *Baxendale v. Great Western R. Co.*, 14 C. B. (N. S.) 1; 16 C. B. (N. S.) 137 (1863). The case of *Garton v. Bristol & Exeter R. Co.*, in so far as it lays down a contrary doctrine, was overruled. The same rule has been affirmed in later cases. *Evershed v. London & N. W. R. Co.*, 2 Q. B. D. 254; 3 Q. B. D. 134; L. R., 3 H. L. App. Cas. 1029 (1875); *Denaby Main Colliery Co. v. Manchester, etc., R. Co.*, L. R., 11 H. L. App. Cas. 97 (1885); *Brown v. Great Western R. Co.*, 9 Q. B. D. 744 (1880). See, also, English cases cited in section 2.

The correctness of the English doctrine is open to question. It would seem to lead to the absurd consequence pointed out in *Garton v. B. & E. R. Co.*, 1 B. & S. 112, 154, that if a carrier should perform a service for some one for nothing every other person for whom a like service had been performed could recover back all he had paid. The action for money had and received lies where the defendant has money in his hands which in equity and in good conscience he ought to turn over to the plaintiff. It may well be doubted whether equity and good conscience require a carrier to pay back to the shipper any part of what is only a reasonable compensation for his service, although they may require that he should not charge others less than what is reasonable. The distinction is not of any great practical importance, for, if an action for money had and received will not lie, there are other adequate remedies, as we shall show hereafter.

5. A greater charge for the same service, or for a less service, where the greater includes the less, is prima facie unreasonable and excessive.—While the fact that one person is compelled to pay a greater price than is exacted from others for the same service, does not necessarily or conclusively show that the greater charge is unreasonable or excessive, it is prima facie evidence of such unreasonableness, and, if unexplained, will warrant a verdict to that effect. *Cook v. Chicago, etc., R. Co.*, 81 Iowa, 551; 8 Am. R. R. & Corp. Rep. 550; *Louisville, etc., R. Co. v. Crown Coal Co.*, 43 Ill. App. 228; *St. Louis, etc., R. Co. v. Hill*, 14 Ill. App. 579; *Illinois Central R. Co. v. People*, 121 Ill. 304; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517; 32 N. E. Rep. 311; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep. 309; *Kinsley v. Buffalo, etc., R. Co.*, 37 Fed. Rep. 181; *Sutton v. Great*

Western R. Co., 3 H. & C. 800; Great Western R. Co. v. Sutton, 4 Eng. & I. App. 226; Crouch v. London & N. W. R. Co., 2 Carr. & Kir. 789; Evershed v. London & N. W. R. Co., 2 Q. B. D. 254; 3 Q. B. D. 134; L. R., 3 H. L. App. Cas. 1029; Rhymney Iron Co. v. Rhymney R. Co., 6 R. & C. Traffic Cas. 60; Harris v. Cockermouth & Workington R. Co., 3 C. B. (N. S.) 693; 91 E. C. L. R. 693; Baxendale v. Eastern Counties R. Co., 27 L. J. C. P. 137, 145. Possibly proof of a solitary instance of a less charge might not be sufficient to justify the conclusion that the greater charge was unreasonable. See remarks of Blackburn, J., in Great Western R. Co. v. Sutton, L. R., 4 Eng. & I. App. 226, above quoted. But reason and authority both support the view, that proof of repeated instances of the less charge is sufficient to show that the greater charge is unreasonable to the extent of the excess. Railroad companies are not organized for charity and they do not pretend to do a charity business. When it is shown that a railroad company has repeatedly performed a certain service, for a certain price, it is fair to presume, and, in short, it is the only reasonable inference, that that price is regarded by the company as a fair compensation for the service rendered. If so, it follows that a greater charge for the same service is unreasonable to the extent of the excess. If the greater is no more than a reasonable compensation, the burden should be upon the company to show it. It, alone, is in a position to make this proof. As said by Willes, J., in Baxendale v. Eastern Counties R. Co., 27 L. J. C. P. 137, 145: "When a higher charge is made than is charged to another person for the same services there would be evidence upon which a jury might come to the conclusion that it was an unreasonable charge, and for this simple reason, that unless circumstances were shown to explain why it was that a less charge was made to another person, that charge might be taken by the jury, as it ordinarily would be, as a reasonable charge, unless an overcharge is proved."

The following cases tend to support a contrary view: Cowden v. Pacific Coast S. S. Co., 94 Cal. 470; 29 Pac. Rep. 873; Johnson v. Pensacola & P. R. Co., 16 Fla. 623; Illinois & St. L. R. Co. v. Beaird, 24 Ill. App. 322. The first two cases were suits to recover the difference between what the plaintiff had been compelled to pay for a certain service and what had been charged others for a like service. Demurrers were sustained to the declaration, which merely set up the difference in charges, but did not aver that the sums charged plaintiff were unreasonable or extortionate. As the rule of equality does not obtain in California and Florida, the averment that the charge exacted of the plaintiff was unreasonable was indispensable to a recovery. The opinions, however, carry the idea that proof of the lower charge would not even be *prima facie* evidence of the unreasonableness of the greater charge. The decision of the Illinois Court of Appeals, in so far as it tends to show that proof of the smaller charges is not *prima facie* evidence that the greater charge is unreasonable, is not in harmony with the decisions of the Supreme Court of that state. See Illinois Central R. Co. v. People, 121 Ill. 304.

Of course, one inequality does not necessarily prove an unjust discrimination. The difference in charge for the same or a like service may be justified by a difference in circumstances and conditions. See note to Hoover v. Pennsylvania R. Co., ante, p. 252. In Houston, etc., R. Co. v. Rust, 58 Tex. 98, it appeared that during a rate war the defendant company had made secret

contracts with certain shippers to transport cotton for them for the season at a specified price per bale, whether the ruling rates were more or less. The war was adjusted and rates were advanced beyond the contract rate. The plaintiffs, having paid the schedule rates in ignorance of the contracts, sued to recover back the excess they had paid over the contract rate. The trial court held, in effect, that a difference in charge for the same service was evidence from which the jury might find the higher rate extortionate, irrespective of all other circumstances shown. The Supreme Court held this to be error, and, in course of an opinion which is not very lucid, say: "The test of liability submitted by the charge was confined to the single question of inequality in the rate of freight charged to the plaintiffs as compared with the rate charged to certain other specified persons, irrespective of any or all of the other facts of the case. In this the court erred. It ought to have been submitted to the jury to determine whether, under all the facts of the case, the defendant charged the plaintiffs a rate beyond what was reasonable, and beyond the price which was exacted of the public generally, at the times when the plaintiffs shipped their cotton on defendant's railroad. And if, although the plaintiffs were not required to pay a higher rate than were the public generally, yet if the defendant had allowed to certain particular persons, or merchants in a certain particular locality, more advantageous terms than had been given to the public generally or to the plaintiffs, it ought to have been submitted as an issue of fact for the jury to determine whether (under appropriate instructions applicable to the subject), under all the evidence applicable to the question, such preference so given was a fair and legitimate one; one justified by the common-law rule forbidding the carrier to give to one special privileges which it denies to another, but which at the same time does not exclude as forbidden contracts for transportation at a less rate in special cases where, under the circumstances, the discrimination appears reasonable."

6. The question of voluntary payment in suits to recover back excessive charges.—The authorities upon this subject are quite fully reviewed by the Supreme Court of Indiana in *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517; 32 N. E. Rep. 311. The suit was to recover alleged overcharges on ties shipped by the plaintiffs over the defendant's road. In its opinion the court says: "It is claimed by the appellant that the court erred in overruling the demurrer to the fifth and seventh paragraphs of the complaint, because it appears from each of these paragraphs that the payments therein set forth were voluntary payments. It is said by counsel in their brief that no kind of extortion is shown, no pretense that the defendant refused to carry the cross ties or refused to deliver them unless the rates charged were paid, nor is there any claim that the appellees were ignorant of the facts stated in these paragraphs at the time the freight was paid. On the other hand, it is contended by the appellees that payments made to a railroad company or other common carrier for overcharges for carrying freight are not voluntary payments, for the reason that the shipper and the carrier do not stand upon an equality. The only authorities cited by the appellant holding that a payment without protest to a common carrier, for an overcharge, is a voluntary payment, are the cases of *Evershed v. Railroad Co.*, 3 Q. B. D. 134, and *Du Bose*

v. Railroad Co., 50 Ga. 304. We are of opinion, however, that the decided weight of authority is that the payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not a voluntary payment, within the ordinary meaning of that term. In the case of *Heiserman v. Railroad Co.*, 63 Iowa, 732; 18 N. W. Rep. 903, which was an action to recover for overpayment of freights, the court said: 'Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over the consignors and consignees of property transported by them. * * * The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power, to enforce obedience to their requirements. For another reason, they are not required. Those who do business with the railroads never come in contact with the officers who possess authority to fix or abate rates or charges; indeed, they usually hardly know their names or where to find them. * * * These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest.' In the case of *Chicago & Alton R. Co. v. Chicago, V. & W. Coal Co.*, 79 Ill. 121, it was said by the Supreme Court of Illinois: 'In such a case, where the coal company has no other outlet for its coal, and the railroad company exacts more freight than by the terms of the contract they are entitled to, the coal company should be considered as under a kind of moral duress, and the payment by them of the freight demanded, under such circumstances, could not be considered voluntary, and they would have the right to sue upon the contract, and recover back the excess of freight paid over the contract price.' In the case of *Railway Co. v. Steiner*, 61 Ala. 559, which was an action to recover for over-payment of freights on the transportation of cotton, the court said: 'The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation; and if the shipper pays the rates established in violation of law by the carrier, rather than forego his services, such payment is not voluntary in the legal sense, and the shipper may maintain his action for money had and received to recover back the illegal charge.' Indeed, there seems to be but little conflict in the authorities in this country holding that the payment to a railroad company engaged in the business of a common carrier of an overcharge of freight for goods transported over the road of such company is not a voluntary payment, as the law interprets that term. *Peters, Ricker & Co. v. Marietta & C. R. Co.*, 18 Am. & Eng. R. Cas. 492; *Parker v. Railway Co.*, 7 Man. & G. 253; Add. Cont. § 1043; *Railroad Co. v. Lockwood*, 17 Wall. 375; *Beckwith v. Frisbie*, 82 Vt. 559; *Transportation Co. v. Sweetzer*, 25 W. Va. 435; *Railroad Co. v. Pattison*, 41 Ind. 312. In the case of *Railroad Co. v. Pattison*, supra, which was an action to recover back an excessive payment of freight made under an agreement that such payment should not be regarded as voluntary, this court said: 'In the second place, we are of the opinion that money so paid could be recovered back, if there had been no valid agreement that it might

be. While the appellants were not in the actual possession of the cattle of appellee, they possessed such power and control over the shipment and delivery thereof as gave them an undue advantage over the appellee, and the necessity of the appellee was so great as to deprive him of the freedom of his will.' Under these authorities, we are constrained to hold that the payments which appellees in this case are seeking to recover from the appellant are not to be regarded as voluntary payments, and for that reason the complaint is not subject to the objection here urged against it."

In addition to the authorities cited in the foregoing opinion, the cases of *Cook v. Chicago, etc., R. Co.*, 81 Iowa, 551; 3 Am. R. R. & Corp. Rep, 550, and *Great Western R. Co. v. Sutton, L. R.*, 4 Eng. & I. App. 226, support the same views. In *Evershed's* case it appeared that the plaintiff had been charged one shilling and nine pence per ton terminal charges for services which the defendant had performed for other shippers gratuitously. He had paid these charges in ignorance of the facts from March, 1874, to September, 1874, when he learned of the discrimination. He continued to pay the same without objection until January, 1875, from which time he objected and paid under protest. It was held that he could recover for the payments from March to September, because made in ignorance of the facts, and for the payments made under protest, but not for those made between September and January, because made without objection and with full knowledge of the facts. In *Killmer v. New York Central R. Co.*, 100 N. Y. 395, the suit was to recover back overcharges. No question of discrimination was involved, but the plaintiff claimed that the regular schedule of rates was unreasonably high. He had paid the regular rates without objection. The court held that the payment was voluntary, and that this alone barred his claim.

In a suit in tort for damages, by reason of unjust discrimination, the question of voluntary payment does not arise. *Borda v. Philadelphia & Reading R. Co.*, 141 Penn. St. 484.

7. Limitations — fraudulent concealment of cause of action.—In *Carrier v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 80; 44 N. W. Rep. 203, the suit was to recover the excess paid by the plaintiff over a reasonable charge, and was founded solely upon the common law. Plaintiff was a shipper of cattle from Iowa to Chicago, and during the years from 1879 to 1888 had shipped numerous carloads of cattle over the defendant's road and paid the regular tariff rates. From time to time he had inquired and had been told by defendant's agents that there was but one rate, and that no drawbacks or rebates were allowed to any one. In 1888, however, it came to the knowledge of plaintiff that the defendant had allowed other shippers a rebate, whereby they in effect paid seventeen dollars a car less than the plaintiff for the same service. The plaintiff thereupon brought suit to recover this difference. Most of the shipments had been made more than five years before the suit was brought and were barred by the terms of the statute applicable, but the court held that there had been a fraudulent concealment of the cause of action by the defendant, in that it concealed the fact of the rebates, and that the action did not accrue until the plaintiff obtained knowledge of the payment of such rebates. This ruling was followed, in a similar case, in *Cook v. Chicago, etc., R. Co.*, 81 Iowa, 551; 3 Am.

R. R. & Corp. Rep. 550. It may be doubted whether there was any concealment of the cause of action in these cases. The cause of action consisted in the fact that the plaintiff had been charged and had paid more than a reasonable price. The fact that the defendant had charged others less for the same service did not constitute the cause of action, but was only evidence tending to prove the cause of action. This is expressly laid down by the Iowa court in the case last cited, where it is said: "The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable." 3 Am. R. R. & Corp. Rep. 554. It is held to be the concealment of the *cause of action* which postpones the running of the statute, and not the concealment of *evidence*, to prove the cause of action. *Leach v. Moore*, 57 Ark. 583; 22 S. W. Rep. 173, and see generally 13 Am. & Eng. Ency. of Law, 727-730. On the other hand, it may be said in support of the position of the Iowa cases, that the reasonableness of a charge by a carrier is a question of fact, and that the fact is peculiarly within the knowledge of the carrier, and that the concealment of information sufficient to show unreasonableness is virtually the concealment of the fact of unreasonableness, and hence of the cause of action founded thereon. The New York court would seem to hold that it is the duty of a shipper, before he pays a charge, to satisfy himself as to its reasonableness, or, in other words, that he must be presumed to know at the time of payment whether a charge is reasonable. In a case already cited it is said: "The company is doubtless better informed than the shipper as to what would be a compensatory or reasonable charge, but many of the facts which enter into the formation of a judgment on the question are accessible to the shipper, and it would not be in accordance with general principles of justice that he should be permitted to forbear all means of ascertaining the truth, and after the lapse of years for the first time to open a question which he did not, at the time of the transaction, regard of sufficient importance to engage his attention." *Killmer v. New York Central, etc., R. Co.*, 100 N. Y., 395, 402, 403.

These difficulties would not arise in case of an action in tort for damages by reason of the unjust discrimination, as the cause of action would be founded upon the unjust discrimination, and if that was concealed, the cause of action would be concealed.

8. Action in tort for damages occasioned by unjust discrimination. — We have endeavored to show in a former note that railroad companies are under a common-law obligation to treat their patrons with impartiality. 8 Am. R. R. & Corp. Rep. 700, 723-727. Assuming this to be the law, the duty is one which the company owes, not only to the public generally, but to each member of the public individually, and it follows that for any breach of the duty resulting in damage to the individual, he may have his action to recover for such damage. In such an action the question of a reasonable charge does not arise. If there has been an unjust discrimination, as between the plaintiff and others, and that discrimination has resulted in damage to the plaintiff, then the plaintiff is entitled to recover the damages proved. If the discrimination consists, as is usually the case, in a difference in charges, it does not matter that the greater charge is reasonable. Such actions have been maintained in numerous cases, and we do not know of any case in which the right to maintain such an action has been judicially denied. New England

Express Co. v. Maine Central R. Co., 57 Maine, 188; *McDuffee v. Railroad Co.*, 52 N. H. 480; *Borda v. Philadelphia, etc., R. R. Co.*, 141 Penn. St. 484; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep. 309; *Crouch v. Great Western R. Co.*, 9 Exch. 556; *Garton v. Bristol & Exeter R. Co.*, 1 B. & S. 112; 101 E. C. L. R. 112; *Pickford v. Grand Junction R. Co.*, 10 M. & W. 399; 3 Eng. Ry. & Canal Cas. 193. Although the claim of unjust discrimination was not maintained in the following cases, it does not seem to have been questioned but what a suit for damages was an appropriate remedy: *Eclipse Tow Boat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1; *Sargeant v. Boston & Lowell R. Co.*, 115 Mass. 416.

If the plaintiff suffers no damage, he would probably not be entitled to maintain the suit for nominal damages. It is said by the court in *Carrier v. Chicago & C. R. Co.*, 79 Iowa, 80; 44 N. W. Rep. 203, that "mere discrimination without injury would not be actionable."

Where the suit is founded upon discrimination in charges, the measure of damages usually adopted is the difference between what the plaintiff has paid and what has been charged the most favored shipper. In most cases this rule is tacitly assumed, and is the only practicable one to be adopted. In the principal case the suit was under a statute allowing a recovery of "three times the amount of the damages sustained." It was held that the "damages sustained" were measured by the difference in charge. In *Union Pacific R. Co. v. Goodridge*, 8 Am. R. R. & Corp. Rep. 684, where the suit was upon a statute which allowed the aggrieved party to recover "three times the actual damages sustained or overcharges paid," and the plaintiffs complained of discriminations in favor of rival dealers, who had been allowed rebates, it was held that "the damages sustained by the plaintiffs were measured by the amount of such rebate." It was also held that loss of profits was too remote to be made an element of damages. It is difficult to see how a man's profits in business by reason of discrimination in charges could be diminished more than the difference he had been compelled to pay over his rivals. But if other actual damages could be shown doubtless they might be recovered.

In *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep. 309, which would appear to have been a suit in tort, the court instructed the jury that the discrimination in question was illegal and a wrong to the plaintiffs "for which they were entitled to recover the damages resulting to them therefrom, to wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors." It is proper to say that it is doubtful from the report whether this was an action of assumpsit or of tort.

In *Hoover v. Pennsylvania R. Co.*, ante, p. 252, which was a suit under a statute for "treble the amount of injury suffered," it was held that the "injury suffered" was not measured by the difference in charge, where the parties were not in competition, but that the actual injury must be proven.

Where the suit is brought upon a discrimination in some other matter than charges, the damages would be measured by the actual injury proved. *Crouch v. Great Northern R. Co.*, 9 Exch. 556; *Garton v. Bristol & Exeter R. Co.*, 1 B. & S. 112; 110 E. C. L. R. 112.

9. Remedy in equity.—It has been held in a number of cases that a bill in equity will lie to restrain the practice of an unjust discrimination, or to compel the defendant company to grant the plaintiff rates and facilities equal to those granted to more favored shippers. *International Express Co. v. Grand Trunk R. Co.*, 81 Maine, 92; *Scofield v. Railroad Co.*, 43 Ohio St. 571; *McCoy v. Cincinnati, etc., R. Co.*, (Circ. Ct. Ohio) 22 Am. Law Reg. 725; *Sandford v. Railroad Co.*, 24 Penn. St. 378; *Twells v. Pennsylvania R. Co.*, (Sup. Ct. Penn.) 3 Am. Law Reg. (N. S.) 728; *Attorney-General v. Railroad Co.*, 35 Wis. 425; *Menacho v. Ward*, 27 Fed. Rep. 529; *Dinsmore v. Louisville, etc., R. Co.*, 2 Fed. Rep. 465; *Texas Express Co. v. Texas & Pacific R. Co.*, 6 Fed. Rep. 426; *Southern Express Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 799; *Southern Express Co. v. St. Louis, etc., R. Co.*, 10 Fed. Rep. 210; 2 Mor. Corp. §§ 1043, 1132. In *Audenried v. Philadelphia & Reading R. Co.*, 68 Penn. St. 370, and *Ragan v. Aiken*, 9 Lea, 609, the respective courts found against the plaintiffs on the merits, and thus indirectly sanctioned the propriety of the remedy, which was by bill in equity. A suit for damages or a mandamus is held not to be such an adequate remedy as will oust a court of equity. The propriety of the remedy in equity is especially considered in *Scofield v. Railroad Co.*, 43 Ohio St. 571, and *McCoy v. Cincinnati, etc., R. Co.*, 22 Am. Law Reg. 725.

10. Remedy by mandamus.—In *Atwater v. Delaware, L. & W. R. Co.*, 48 N. J. L. 55, it was held that a mandamus would lie to compel the defendant to sell the relator a commutation ticket. Where rates were regulated by statute and the act allowed a recovery of double the amount of any overcharge and of at least twenty dollars in any case, and the defendant refused to carry for the statutory rate, it was held that mandamus would not lie to compel it to perform the service, but that the statute gave an adequate remedy. *State ex rel. v. Mobile, etc., R. Co.*, 59 Ala. 321. See, also, *Morris v. Delaware, L. & W. R. Co.*, 40 Fed. Rep. 101.

11. Remedy by quo warranto.—In *State ex rel. Kohler v. Cincinnati, W. & B. R. Co.*, 47 Ohio St. 130; 2 Am. R. R. & Corp. Rep. 106, an unjust discrimination between oil shipped in tank cars and oil shipped in barrels in carload lots was corrected in a proceeding in quo warranto. As the case appears in full in the series, we refer to the report for further particulars.

KANSAS PAC. RY. CO. v. BAYLES.

(Supreme Court of Colorado, February 5, 1894.)

1. RAILROAD COMPANIES. DISCRIMINATION. At common law, all shippers stand on an absolute equality with reference to transportation by common carriers, and no such carrier has the right to discriminate in favor of one as against another.

2. CONTRACT FOR REBATES, WHETHER UNLAWFUL. A contract to carry freight at less than the schedule rate by allowing and paying a rebate is not *prima facie* void, either at common law or under the Constitution, article 15,

section 6, which provides that no unreasonable discrimination shall be made in charges for transportation, and that no preference shall be given in furnishing cars or motive power, but an agreement not to allow the same rates to others is void.

3. **RECEIVERS. POWER OF GENERAL FREIGHT AGENT TO BIND BY FREIGHT CONTRACT.** The general freight agent of a railroad company, who held such position before receivers of the company were appointed, will be presumed to have the power to bind the receivers by a contract for the transportation of freight, in the absence of a showing to the contrary.

4. **POWER OF RECEIVERS TO MAKE FREIGHT CONTRACTS.** Receivers of a railroad company have power to contract to carry freight at a specified rate from points beyond the terminus of their road to a point on such road.

5. An order of court is not necessary to authorize receivers of a railroad company to make contracts with reference to freight rates.

6. **WHETHER RECEIVER BOUND BY CONTRACTS OF FORMER RECEIVERS. RATIFICATION.** A receiver of a railroad company is not bound by a contract made by his predecessors for a rebate of freight charges, unless he ratifies it.

7. The mere fact that a portion of the rebates accruing before he entered on the discharge of his duties was paid after such time does not constitute a ratification of such contract.

IT is unnecessary to repeat in detail the facts alleged in the complaint as a first cause of action, as the same are fully set out in connection with a former appeal, and will be found in *Bayles v. Railway Co.*, 13 Col. 181; 22 Pac. Rep. 341. It is sufficient for the purposes of this appeal to state that the suit is brought to recover certain rebates agreed to be paid the plaintiff upon freight charges paid to the railroad company. The contract fixing the rate and rebate, it is alleged, was executed on the part of the receivers of the railroad company by S. R. Ainsley, at the time general freight agent at the city of Denver under the receivers, Henry Villard and Carlos S. Greeley. It is averred that Ainsley made the contract for the receivers, and that it was adopted by them and by their successor, S. T. Smith, who afterwards operated the road as receiver; that at the time the contract was made, and during its entire term, Ainsley was operating the railway for the receivers, and that he and they performed it in part by paying rebates according to its terms; that the receivers received the moneys paid by plaintiff for freights under the contract, and used the same, in part, in the operation of the road, paying the balance to appellant, and taking a receipt from the railroad company, by the terms of which the company obligated itself to pay any and all claims against the receiver then outstand-

ing; that this claim was existing at the time of Smith's discharge as receiver. For a second cause of action, it is alleged that during the month of December, 1878, there arrived at Kansas City large amounts of goods consigned to the plaintiff at Denver, entitled to be carried under said contract, but that the defendant refused to carry the same under the contract, and that the goods remaining in Kansas City until after the 1st day of January, 1879, the plaintiff caused the same to be shipped to Denver over the Atchison, Topeka and Santa Fe railroad, and was obliged to pay \$216 more than the contract price of carriage, and that he paid said sum on the 25th day of January, 1879; that said goods were holiday goods, and he lost a profit of \$500 by failure of defendant to carry them under the contract. After the case was remanded by this court the defendant filed an answer: First, denying each and every allegation of the complaint; second, admitting that Greeley and Villard were receivers at the time the contract was made; admitting that Smith was appointed in lieu of said Greeley and Villard on or about the 25th day of October, 1878, and that he continued to act in such capacity until June, 1879; denying that Greeley and Villard, or either of them, had any authority to make the contract. It denies that by order of the court, or otherwise, they were ever empowered to make the contract set forth in the complaint; denies the agency of Ainsley, and alleges that immediately after Smith became receiver, learning of this contract, he repudiated the same, as not made by authority, and as not binding upon him; alleges that the contract was contrary to public policy, and void, and not binding upon either the company or upon the receiver Smith. Afterwards a replication was filed to the new matter in the answer, and upon these issues the cause was submitted in the court below upon the evidence introduced by plaintiff, supplemented by a stipulation of counsel. A verdict and judgment having been rendered for the plaintiff, the defendant again brings the case here by appeal.

Feller & Orahood, for appellant. *Browne & Putnam*, for appellee.

HAYT, Ch. J. (*after stating the facts*). This case is before the court for the second time. Upon the former appeal the sufficiency

of the complaint was inquired into and upheld, and the case remanded for further proceedings. *Bayles v. Railway Co.*, 13 Col. 181; 22 Pac. Rep. 341. The conclusions then reached, and the reasons therefor, are set forth in an exhaustive opinion by Mr. Commissioner Pattison. It is unnecessary to repeat the reasoning of the learned commissioner, or to do more than restate such of his conclusions as bear directly upon the questions now presented. These may be summarized as follows: First. Freight charges must be reasonable, and when the circumstances and conditions are the same they must be equal. Second. An agreement for a rebate from the published tariff rates does not, of itself, necessarily constitute unjust discrimination, within the meaning of the law. Third. The contract set forth in the complaint is *prima facie* legal, and binding upon the parties, and the burden is upon the defendant to establish facts showing its illegality. Fourth. It being expressly alleged that the receiver operated the railway and controlled the business of the company, it cannot be assumed, in the absence of evidence, that the contract was in violation of his authority. These conclusions are, upon the present appeal, *res adjudicata* of the points decided, and must be accepted as the law of this case. *Lee v. Stahl*, 13 Col. 174; 22 Pac. Rep. 436; *Johnson v. Bailey*, 17 Col. 59; 28 Pac. Rep. 81; *Routt v. Land Co.*, 18 Col. 132; 31 Pac. Rep. 858; *Israel v. Arthur*, 18 Col. 158; 32 Pac. Rep. 68.

At common law all shippers stand on an absolute equality with reference to transportation by common carriers, and no such carrier has the right to discriminate in favor of one as against another. In obedience to this universally recognized principle, the framers of our Constitution have provided, in section 6, article 15, as follows: "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employee thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power." Neither the common law nor the constitutional provision inhibits the making of contracts by a common carrier

to transport either persons or freight at less than its schedule rates, but an agreement not to allow the same rates to others is void. To this extent the law is well settled, as will appear by the copious extracts from adjudicated cases, and the citation of numerous authorities to be found in the former opinion in this case. The foregoing views are based upon sound public policy. To permit a railroad company to unjustly discriminate in the carriage of either freight or passengers, in favor of one shipper as against another, or in favor of one locality as against others, would be destructive of common right, and allow private and public enterprises to be built up or pulled down at the will or caprice of a common carrier deriving its franchise from the people.

It is contended, however, that unreasonable discrimination can be best prevented by declaring all contracts for rebates void, but this rule has the disadvantage of allowing a common carrier to profit by its own iniquity. It would tolerate the acquisition of business by means of a promised reduction in rates, and at the same time place it in the power of the carrier to retain the higher rate by denying redress to the shipper. It would seem that the public interest would be equally as well subserved, in cases of this character, by saying to the carrier: "You may contract for a less rate than that provided by the published tariff sheets, but you must give all parties shipping under like conditions and similar circumstances like reduced rates." This is in accordance with the result reached in the case of *Railway Co. v. Goodridge*, 149 U. S. 680; 13 Sup. Ct. Rep. 970, but the conclusion in that case is based upon a statute of this state. The cause of action in the present case having arisen before the passage of any statute on the subject by the federal congress or the state of Colorado, this case must be determined independently of statute law.

It is contended that Ainsley's authority to execute the contract on behalf of the receivers is not sufficiently shown, and that the contract was not sufficiently established to render the same admissible in evidence. The evidence shows that the contract was executed by Mr. S. R. Ainsley, he being at the time the freight agent at Denver of the receivers, Villard and Greeley, then operating the railroad; that he (Ainsley) occupied the same position with reference to the company prior to the appointment of the receivers; and that he continued in the same position after the

resignation of Villard and Greeley, and the appointment of S. T. Smith as receiver. The evidence also shows that the existence of the contract was well known to the general officers of the road, and that they undertook to carry out its provisions until Receiver Smith assumed control. It is not to be expected that the receiver of an extended line of railroad, traversing several states, and doing a general business, will be personally consulted with reference to all contracts made in the management of the business of the corporation. He must necessarily act through others in many matters of importance; and, in the absence of evidence to the contrary, the court had a right to assume that Ainsley's authority under the various receivers was the same as that exercised by him while occupying a similar position before the management passed into the hands of the court. We do not think that any order of court is necessary to authorize the making of contracts with reference to freight rates. Such matters are usually left to the officers of the freight department of a railroad company. In the case of *Railroad Co. v. Headland*, 18 Col. 477; 33 Pac. Rep. 185, it is said: "The manner in which railroad companies conduct their business has been so long followed, and with such a degree of uniformity, that courts are bound to take judicial notice of its general features." Under the circumstances, we think the contract was properly admitted in evidence.

The agreement being to carry goods from New York, Chicago and St. Louis to Denver, while the appellant's road did not extend east of Kansas City, it is urged that the making of the contract was beyond the power of the receivers. We do not think this contention is well founded. The receivers, subject to the orders of the court from whom their authority emanated, had full power to conduct the business of the corporation according to approved methods of operating such enterprises; and no reason is perceived why such officers should not be permitted to make contracts for the carriage of freight and passengers beyond the limits of the road immediately under their control. Such contracts are usual, and perhaps necessary, in many instances, to the successful operation of the business of common carriers, and are also a great public convenience.

By the former opinion of this court in this case, the burden of showing the illegality of the contract by pleading and proof was

placed upon the defendant. The answer thereafter filed contains no allegation to the effect that the enforcement of the contract would inflict any injustice upon any other shipper. It is, however, alleged in the answer that Smith, from the first, refused to receive or transport merchandise under the contract, or for less than schedule rates — and from the evidence adduced, and the stipulation entered into at the trial, it is shown that upon several occasions, while Smith was operating the road as receiver, merchandise of plaintiff was refused transportation at less than schedule rates, but the exact date of such refusals does not clearly appear. Although the contract be established as a valid contract of the receivers Villard and Greeley, it does not follow that it was binding upon their successor, Smith. As receiver, he cannot be held merely on the contract, but became liable, if at all, solely by reason of his own acts. *Turner v. Richardson*, 7 East, 335; *Com. v. Franklin Ins. Co.*, 115 Mass. 278. Mr. Beach, in his work on Receivers, at section 299, says: "Contracts made by a preceding receiver impose no legal duty or obligation on his successor, and damages cannot be recovered at law against the succeeding receiver for refusing to perform the contracts of his predecessor." And in the case of *Lehigh Coal & Nav. Co. v. Central R. Co.*, 38 N. J. Eq. 175, it is said: "It is certain the present receiver is no party to these contracts. He neither negotiated them nor assented to them. He has not been directed by the chancellor to perform them. It is not possible, therefore, for me to see how he was under the least legal duty to perform them, nor under what legal rule he can be held liable at law for not performing them. He cannot be said to have broken them, because he was under no obligation to perform them. He had promised nothing, and could not, therefore, be required to perform anything. He is not the representative of his predecessor. In his character as receiver, his predecessor can have no representative, in the legal sense of that term. He was, at best, a mere agent or instrument, and, when he died, his power died also, and he left nothing behind him, as receiver, of either property or power, in which he can be represented so as to make his acts binding on his successor. It may be that the contracts of the first receiver bound the trust." See, also, *Express Co. v. Railroad Co.*, 99 U. S. 191; *Com. v. Franklin Ins. Co.*, *supra*; *In re*

Receivers N. J. & N. Y. Ry. Co., 29 N. J. Eq. 67; Lehigh Coal & Nav. Co. v. Central R. Co., 41 N. J. Eq. 167; 3 Atl. Rep. 134; Ellis v. Railroad Co., 107 Mass. 1. Receiver Smith was not a party to the contract, nor the legal representative of a party, and he was not, in law, bound to carry out its terms, although the court from which his appointment emanated, in the exercise of its equitable powers, might have entertained an application to compel him to do so. He cannot be held to have ratified the contract from the mere fact that a portion of the rebates accruing before he entered upon the discharge of his duties as receiver were paid after he assumed the management of the business. It was not inconsistent for him to say that, in so far as merchandise had been transported under the contract during the management of the former receivers, the terms of the contract should control, and at the same time repudiate the contract as not binding upon him as to future shipments; that for the carriage of goods thereafter offered for transportation the schedule rates should control. If plaintiff relied upon a ratification of the contract by Smith, the evidence introduced is not sufficient to establish such ratification. If Smith or his subordinate officers in the management, with knowledge of the terms of the agreement, received and transported freight under it, or did any other act tending to show ratification, the record fails to disclose such fact.

Under the proof adduced, it was error to allow a recovery upon the claim for rebates for freight shipped during Smith's administration of the affairs of the company. It was likewise error to include in the judgment the amount claimed under the second cause of action pleaded. Our conclusion upon the case, as now presented, is that the contract imposed an obligation upon the receivers Villard and Greeley to refund the rebates, as specified therein, in so far as plaintiff's merchandise was received and transported during the time they were operating the road as receivers, and that appellant, having received the benefit of the excess paid, is liable to plaintiff in this action therefor, but that the evidence neither justified a recovery for rebates upon merchandise shipped during the time that Receiver Smith was operating the road, nor upon the second cause of action. As the judgment is for a gross sum, and the evidence furnishes no test by

which the correct amount may be ascertained, the judgment must be reversed.*

Common carriers—validity of contract for rebates.—It is a fair inference from the foregoing case that the defendant railroad company had a schedule rate, which was the usual and customary rate charged to shippers, and that the contract sued upon was an agreement to give the plaintiff a special rate, lower than the schedule rate, that is, lower than the usual and customary rate, which special rate was arrived at by the plaintiff paying the schedule rate and receiving back a rebate. The Constitution of Colorado, in force at the time of the contract, prohibited all unjust discrimination, and it was asserted on both appeals of the case, that the Constitution was but declaratory of the common law. The case, as appears from the report, has been twice before the Supreme Court. The first appeal was from an order sustaining a demurrer to the declaration. The Supreme Court reversed the order, after which there was a trial and judgment for the plaintiff, from which the second appeal was prosecuted. The declaration set up the contract and the overcharge, but did not show that there was any schedule rate, or that the rate provided for in the contract was a special rate or different from that charged any other shipper. The contract did not provide for the payment of rebates, but fixed the net rate to be paid by the plaintiff. The only suggestion of rebates was in the following provision: "And it is further agreed that the said party of the second part shall notify and correct all overcharges, and protect the said party of the first part in the above-named rates, in Denver, Col." See contract, 13 Col. 181; 22 Pac. Rep. 341. The declaration set forth the contract and merely showed that there was an agreement to transport merchandise for the plaintiff at a specified rate, that he had been charged and had paid more than that rate, and that he sought to recover the difference.

The report of the second appeal shows that the answer, among other things, alleged that the contract was contrary to public policy and void, but it does not show that any facts were alleged from which that conclusion followed, nor what evidence was introduced upon that point. It does appear, however, that the defendant had a schedule rate and that the schedule rate was more than the contract rate, and that a new receiver, appointed after the contract was made, refused to recognize the contract and insisted upon the schedule rates. The contract was treated by the court as, in effect, one for rebates. It would seem that such a contract is almost, *ex vi termini*, an agreement to give an undue preference, that its necessary, or at least presumable, effect is to create an unjust discrimination. If the phrase, a "schedule rate," means anything, it means that it is the regular and customary rate, the open and public rate, charged for the service specified. A contract for rebates is upon its face an agreement in effect to give the shipper with whom it is made a rate less than the regular, customary and public rate charged to shippers generally, and is, therefore, prima facie, an undue preference and an unjust discrimination. *Fitzgerald v. Grand Trunk R. Co.*, 4 Am. R. R. & Corp. Rep. 361. To say that it is to be presumed that similar contracts are made with

* Reported in 35 Pac. Rep. 744.

every shipper who desires the same service, and that it is to be deemed valid, until it is proven by affirmative evidence that it is a secret arrangement, and that others are in fact charged more for the same service, is to ignore the plain inferences from the facts and the ordinary motives which actuate men in doing business. If a railroad company concludes for any reason to carry for less than its schedule rate, why should it adopt the cumbrous and expensive method of making a special contract with each shipper, and of collecting the schedule rate and refunding the difference? The direct, natural and economical mode of accomplishing the result would be to reduce the schedule rate. It seems to us that the only reasonable inference is that a contract for rebates is made for the purpose of giving the particular shipper a rate less than that charged the public generally; that a rate less than that charged the public generally is presumptively an undue preference, and an unjust discrimination, and is contrary to the rule of the common law already referred to. If there is a difference in circumstances and conditions which justify it, the burden should be upon the plaintiff to show it.

The authorities are generally agreed that where a contract for rebates is intended to give and does give an undue preference or create an unjust discrimination it is void and non-enforcible. *Bayles v. Kansas Pac. R. Co.*, 13 Col. 181; 22 Pac. Rep. 341; *Indianapolis, etc., R. Co. v. Erwin*, 118 Ill. 250 (overruling *Erie & Pacific Dispatch v. Cecil*, 112 Ill. 180, and distinguishing *T., W. & W. R. Co. v. Elliott*, 76 Ill. 67); *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348; 3 Am. R. R. & Corp. Rep. 686; *Hawley v. Kansas & Texas Coal Co.*, 48 Kans. 593; 30 Pac. Rep. 14; *Bullard v. Northern Pac. R. Co.*, 10 Mon. 168; 25 Pac. Rep. 120; *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407; S. C., 37 N. J. L. 531; *Root v. Long Island R. Co.*, 114 N. Y. 300; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169; 4 Am. R. R. & Corp. Rep. 361. See, also, *Parks v. Jacob Bold Packing Co.*, 27 N. Y. Supp. 289. The case of *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505 (Court of Errors and Appeals), appears to be the only one in which a contract for rebates was upheld, although it plainly appeared that an unjust discrimination was intended. The contract provided that the defendants were to pay the regular rates and receive back one-half as a drawback, and *no drawback was to be allowed to any competitor of defendants*. The purpose of this contract to give an undue preference was thus manifest upon its face. The court held that the agreement not to allow a drawback to others was void, but that the agreement to allow the defendants a drawback was valid; that the contract was divisible, and that the void part could be separated from the valid part and the latter enforced. The court says: "But it by no means follows that because this agreement not to allow drawbacks to others is void, therefore the agreement to allow it to the defendants also falls. The policy which holds invalid such monopoly clauses, exists for the benefit, not of the corporation, but of the public, and its true legal aspect is presented in saying, not that the company must charge the defendants as high rates of toll as it charges others generally, but that it must charge others generally as reasonable rates of toll as it charges the defendants. The interests of the corporation in this respect may safely enough be confided to its own keeping; it is the interest of the public which this principle of policy is intended to guard. The

contract held invalid in the *Messenger* case, above cited, was indeed one inuring to the benefit of the individual and against the corporation, but its terms were such that it could not possibly be effectuated without giving the plaintiff a preference against the public; it was, in effect, that whatever rate should be charged against any one else, twenty per centum less should be charged to the plaintiff. Plainly, such a contract was not consistent with the company's duty of impartiality. As soon as the general rates were reduced to the standard of the plaintiff's, he was entitled to have his rates reduced twenty per centum lower. In the case before us, however, the drawback is not to be governed by the rates charged the public, but by the printed rates of tolls for the time being, and the general right of the public in no way conflicts with such an allowance, that right being to have the general actual charges fixed, not at the same rate, but at as reasonable a rate, all things being considered, as that charged to the defendants. Obviously, therefore, the drawback clause in this contract is in no way involved with, or dependent upon, the monopoly clause; and, in accordance with the well-settled principle so clearly applied by the Supreme Court of this state in the case of *The Erie Railway Co. ads. The Union Locomotive Express Co.*, 6 Vroom (35 N. J. L.), 240, the illegality of the latter does not affect the validity of the former covenant."

It does not seem to us, however, that the shipper stands upon any better footing than the railroad company, in respect of a contract for preferential rates, which he has knowingly induced the company to make in violation of law, and for the purpose of obtaining an unfair advantage over his rivals. The law should leave both parties to such contracts where they leave themselves. And such is the decided weight of authority as appears from the cases already cited.

The chief discrepancy in the authorities has reference to the presumptions that are to be indulged in respect of such contracts. A contract for rebates may be valid if the same terms are accorded to every shipper under substantially the same circumstances and conditions. So it may be valid, though the same terms are not accorded to other shippers, if there is a dissimilarity of circumstances and conditions sufficient to justify it. Since such a contract may be valid or invalid, according to circumstances, some courts hold that it is to be presumed to be valid until it is made to appear that it was in fact intended to give an undue preference or to create an unjust discrimination. *Bayles v. Kansas Pac. R. Co.*, 13 Col. 181; 22 Pac. Rep. 341; *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348; 3 Am. R. R. & Corp. Rep. 686; *T., W. & W. R. Co. v. Elliott*, 76 Ill. 67; *Erie & Pac. Dispatch v. Cecil*, 112 Ill. 180; *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453; *McNees v. Missouri Pac. R. Co.*, 24 Mo. App. 224. In *Marsh v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 332; 44 N. W. Rep. 562, a suit for rebates was sustained, but the point in question was not discussed. In *Ex parte Benson*, 18 S. C. 38, the plaintiff was allowed to recover rebates, though it appeared that he was thereby obtaining a rate which was less than the customary rate, but the South Carolina court does not hold to the rule of equality. The Illinois cases cited are virtually overruled by the case of *Indianapolis, etc., R. Co. v. Erwin*, 118 Ill. 250. The Missouri cases are based upon the overruled Illinois cases.

On the other hand, the case of *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt.

169; 4 Am. R. R. & Corp. Rep. 361, strongly maintains that a contract to pay a rebate from the regular or schedule rate is presumptively illegal and void. In *Root v. Long Island R. Co.*, 114 N. Y. 300, a contract for rebates was sustained, but the plaintiff had given a consideration therefor in the way of collateral agreements, which had been performed on his part, and the court say that if the contract for rebates stood alone and unexplained they would be inclined to hold it an unjust discrimination, and, therefore, void. The same view is supported by the following cases, though the precise point as to the presumption of law was not involved: *Indianapolis, etc., R. Co. v. Erwin*, 118 Ill. 250; *Bullard v. Northern Pac. R. Co.*, 10 Mon. 168; 25 Pac. Rep. 120; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407; 37 N. J. L. 531; *Parks v. Jacob Bold Packing Co.*, 27 N. Y. Supp. 289.

REAGAN ET AL. V. FARMERS' LOAN & TRUST CO. ET AL.

(Supreme Court of the United States, May 26, 1894.)

1. STATE RAILROAD COMMISSION. SUIT TO ENJOIN ENFORCEMENT OF RATES ESTABLISHED BY. JURISDICTION OF FEDERAL COURTS. A suit against railroad commissioners of a state, to restrain enforcement of their regulations, as unjust and unreasonable—the state having no direct pecuniary interest therein—is not within the Constitution, amendment 11, providing that the judicial power of the United States shall not extend to any suit against a state by citizens of another state.

2. That a state statute, under which railroad commissioners assume to act, is constitutional, does not oust a federal court of jurisdiction to restrain their excessive and illegal acts.

3. Under act of Texas, April 8, 1891, section 6, allowing suits against the railroad commissioners appointed by the act to be brought “in a court of competent jurisdiction in” a specified county, such a suit may be brought by a citizen of another state in the United States Circuit Court held in that county.

4. The question whether the contract rights created by the charter of a railroad company by a state are violated by subsequent acts of the state, limiting the right to collect tolls, is one for the determination of which a citizen of another state, who, under the laws of the state creating the corporation, has become the beneficial owner of its property, may invoke the judgment of the federal courts, in a suit to restrain state officers from enforcing such acts.

5. POWER OF STATE TO REGULATE RATES AND FARES. A state has an undoubted right to regulate the fares and freights which may be charged and received by railroads or other carriers, and such regulation may be effected by means of a commission.

6. POWER OF COURTS TO INQUIRE INTO THE REASONABLENESS OF RATES ESTABLISHED BY A COMMISSION. While it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for car-

riage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of the property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property.

7. **FACTS HELD TO MAKE A PRIMA FACIE SHOWING THAT RATES ESTABLISHED BY A COMMISSION WERE UNJUST AND UNREASONABLE.** On demurrer to a bill to restrain enforcement by state railroad commissioners of a tariff of rates prescribed by them for carriage of goods by a railroad, averring that such tariff was unjust and unreasonable, it was admitted that the road cost far more than the amount of the company's stock and bonds outstanding, which represented money invested in its construction; that there had been no waste or mismanagement in the construction or operation; that supplies and labor had been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company had been for ten years steadily decreasing, until the aggregate decrease had been more than fifty per cent; that under the rates thus voluntarily established the stock, which represented two-fifths of the value, had never received anything in the way of dividends, and that for the last three years the earnings above operating expenses had been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, had resulted in a large reduction in receipts, and would so diminish the earnings that they would not pay one-half the interest on the bonded debt above the operating expenses. Held, that, in the absence of any satisfactory showing to the contrary, this justified a finding that the proposed tariff was unjust and unreasonable, and a decree restraining it being put in force.

8. **COMMISSIONERS CANNOT BE ENJOINED FROM ESTABLISHING REASONABLE RATES AND REGULATIONS.** The decree appealed from was held erroneous in so far as it enjoined the commissioners from discharging the duties imposed by the act in question, and from establishing any rates or regulations, and affirmed so far only as it restrained the defendants from enforcing the rates already established.

THIS was a suit by the Farmers' Loan and Trust Company against John H. Reagan, W. P. McLean, L. L. Foster (railroad commissioners of the state of Texas), C. A. Culberson (attorney-general of the state), the International and Great Northern Railroad Company, and Thomas N. Campbell (receiver of that company), brought to restrain said railroad commissioners from enforcing certain rates and regulations prescribed by them for said company, and to restrain the attorney-general from suing for penalties for failure to conform to such rates and obey such regulations. The railroad company filed an answer and a cross-bill similar to complainant's bill, and praying substantially the same relief. The railroad commissioners and the attorney-general filed

answers, but afterwards withdrew their answers and filed demurrers. Their demurrers were overruled and a decree for defendants was rendered, making a temporary injunction previously granted (51 Fed. Rep. 529) perpetual. The railroad commissioners and the attorney-general appealed.

On April 3, 1891, the legislature of the state of Texas passed an act to establish a railroad commission. The first section provides for the appointment and qualification of three persons to constitute the commission, the second for the organization of the commission, while the third defines the powers and duties of the commission, and is as follows :

“Sec. 3. The power and authority is hereby vested in the railroad commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this act prescribed through proper courts having jurisdiction.

“(a) The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient.

“(b) The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this act for the transportation of each of said classes and subdivisions.

“(c) The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this act.

“(d) The said commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads.

“(e) The said commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this state reasonable joint rates of freight charges for the

various classes of freight and cars that may pass over two or more lines of such railroads.

“(f) If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, the commission shall fix the pro rata part of such charges to be received by each of said connecting lines.

“(g) Until the commission shall make the classifications and schedules of rates as herein provided for, and afterwards if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject thereto, and fix the rates to be charged by such roads therefor; and such classifications and rates shall be put into effect in the manner provided for general classifications and schedules of rates.

“(h) The commission shall have power, and it shall be its duty from time to time, to alter, change, amend or abolish any classification or rate established by it when deemed necessary; and such amended, altered or new classifications or rates shall be put into effect in the same manner as the originals.

“(i) The commission may adopt and enforce such rules, regulations and modes of procedure as it may deem proper to hear and determine complaints that may be made against the classifications or the rates, the rules, regulations and determinations of the commission.

“(j) The commission shall make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road; and may establish for each railroad or for all railroads alike reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-eight hours' notice to the consignee, not to include Sundays.

“(k) The commission shall make and establish reasonable rates for the transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto.”

The first paragraph of the fourth section is in these words:

"Sec. 4. Before any rates shall be established under this act, the commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

The remaining paragraphs give power to adopt rules of procedure. The fifth, sixth and seventh sections are as follows:

"Sec. 5. In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 hereof.

"Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending; provided, that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice.

"Sec. 7. In all trials under the foregoing section the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifica-

tions, acts or charges complained of are unreasonable and unjust to it or them."

Sections 8-13 contain special provisions which are not material to the consideration of any question presented to this case.

Section 14 reads:

"Sec. 14. If any railroad company subject to this act, or its agent or officer, shall hereafter charge, collect, demand or receive from any person, company, firm or corporation a greater rate, charge or compensation than that fixed and established by the railroad commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the state of Texas a sum not less than \$100 nor more than \$5,000."

Section 15 defines "unjust discrimination," and imposes a penalty of not less than \$500, nor more than \$5,000, upon any railroad company violating any provision of the section.

Section 16 is leveled against officers and agents of railroads, and imposes a penalty of not less than \$100, nor more than \$1,000, for certain offenses denounced therein.

Section 17 declares that any railroad company violating the provisions of the act shall be liable to the persons injured thereby for the damages sustained in consequence of such violation, and in case it is guilty of extortion or discrimination, as defined in the act, shall pay, in addition to such damages, to the person injured, a penalty of not less than \$125, nor more than \$500.

In sections 18 and 19 are further provisions as to penalties. The remaining sections — 20 to 24, inclusive — contain matter of detail, which is unimportant in this case.

Three of the plaintiffs in error, Reagan, McLean and Foster, were duly appointed and qualified as members of said railroad commission, and organized it on the 10th day of June, 1891. The other plaintiff in error, Culberson, is the attorney-general of the state, who, by section 19 of the act, was charged with the duty of instituting suits in the name of the state for the recovery

of all the penalties prescribed by the act, excepting those recoverable by individuals under the authority of section 17.

After the commission had organized, on June tenth, it proceeded to establish certain rates for the transportation of goods over the railroads in the state, and also certain regulations for the management of such transportation. Thereafter, on April 30, 1892, the Farmers' Loan and Trust Company filed its bill in the Circuit Court of the United States for the western district of Texas, making as defendants the railroad commissioners, the attorney-general, the International and Great Northern Railroad Company, and Thomas M. Campbell, the receiver thereof, duly appointed by the District Court of Smith county, Tex. That bill, which is too long to be copied in full, alleged that the plaintiff was the trustee in a trust deed executed by the railroad company on the 15th day of June, 1881, to secure a second series of bonds, aggregating \$7,054,000, bearing interest at the rate of six per cent per annum, and that there was a prior issue of bonds, to the amount of \$7,954,000, secured by a conveyance to John S. Kennedy and Samuel Sloan, as trustees. It then set forth the Railroad Commission Act, heretofore referred to, or so much thereof as was deemed material, the proceedings of the commission, and the notices that were given to the railroad company, and attached as exhibits the several orders prescribing rates and regulations. It also averred generally that such rates were unreasonable and unjust, set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates, or any other rates, and also restraining the attorney-general from instituting any suits to recover penalties for failing to conform to such rates and obey such regulations. The International and Great Northern Railroad Company appeared, filed an answer, and also a cross-bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief. The railroad commission and the attorney-general at first filed answers, but, after a certain amount of testimony had been taken (of the nature and extent of which we are not advised, inasmuch as it is not preserved in the record), they withdrew their answers and filed demurrers, leave being given at the same time to the complainant and cross-complainant to amend

the bill and cross-bill before the filing of the demurrer. The amendments to the bill and cross-bill were similar, containing allegations more in detail of the losses in revenue sustained by the company through the enforcement of the tariffs, and the average reduction caused by such tariffs in the rate theretofore existing, and also setting forth certain contract rights under an act of the legislature of the state of Texas passed on February 7, 1853. Thereafter the cause was submitted to the court on the bills and cross-bills and demurrers, and on March 23, 1893, a decree was entered in favor of the plaintiff, as follows:

“This cause having been set down for final hearing on the pleadings and evidence, and being called for hearing thereon, the defendants John H. Reagan, William P. McLean, L. L. Foster and Charles A. Culberson presented their motion, on file herein, for leave to withdraw their answers and file demurrers, which motion was granted, conditioned upon the said defendants paying all costs of taking depositions and evidence, herein against them to be taxed, and for which execution may issue, and on condition that the complainant and cross-complainant have leave to amend before the filing of the demurrers of the said defendants, which leave was granted, and whereupon said amendments were filed, and the demurrers of the said defendants were filed to the original bill of complaint and cross-bill in this cause, as also to all amendments thereto, and were by complainant and cross-complainant set down for argument, by consent, and were by all parties forthwith submitted. And thereupon, in consideration thereof, it was ordered, adjudged and decreed that said demurrers be, and the same are hereby overruled. And the defendants John H. Reagan, William P. McLean, L. L. Foster and Charles A. Culberson having entered of record their refusal to make further answer, and the fact that they stood upon their demurrers, and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged and decreed that the bill of complaint, as amended, and the cross-bill of complaint, as amended, in the above-entitled cause, be, and the same are hereby, sustained, and taken for confessed. And the said cause coming on further to be heard upon the bill of complaint herein, as amended, and upon the answer of the defendant railroad company thereto, confessing the same, it is further ordered, adjudged and decreed as follows, to wit:

"First. That the injunctions heretofore issued in this cause be, and the same are hereby, made perpetual accordingly.

"Second. That defendant, the International and Great Northern Railroad Company be, and it is hereby, perpetually enjoined, restrained and prohibited from putting or continuing in effect the rates, tariffs, circulars or orders of the railroad commission of Texas, or either or any of them, as described in the bill of complaint herein, and in Exhibit C, thereto and therewith filed, and from charging, or continuing to charge, the rates specified in said tariffs, circulars or orders, or either or any of them.

"Third. It is further ordered, adjudged and decreed that the defendants, the railroad commission of Texas, and the defendants John H. Reagan, William P. McLean and L. L. Foster, acting as the railroad commission of Texas, and their successors in office, and the defendant Charles A. Culberson, acting as attorney-general of the state of Texas, and his successors in office, be, and they are hereby, perpetually enjoined, restrained and prohibited from instituting or authorizing or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the state of Texas approved April 3, 1891, and fully described in the bill of complaint, or under or by virtue of any of the said tariffs, orders or circulars of the said railroad commission of Texas, or any or either of them, or under or by virtue of the said act and the said tariffs, orders or circulars of said railroad commission, or any or either of them combined; and said defendants Reagan, McLean and Foster, and the railroad commission of Texas, are further perpetually restrained from certifying any copy or copies of any of said orders, tariffs or circulars, or from delivering, or causing or permitting to be delivered, certified copies of any of said orders, tariffs or circulars to the said Culberson, or any other party, and from furnishing the said Culberson, or any other party, any information, of any character, for the purpose of inducing, enabling or aiding him, or any other party, to institute or prosecute any suit or suits against the said defendant railroad company for the recovery of any penalty or penalties under the said act.

"Fourth. It is further ordered, adjudged and decreed that the said railroad commission of Texas and the said Reagan, McLean

and Foster be perpetually enjoined, restrained and prohibited from making, issuing or delivering to the said railroad company, or causing to be made, issued or delivered to it, any further tariff or tariffs, circular or circulars, order or orders.

"Fifth. It is further ordered, adjudged and decreed that all other individuals, persons or corporations be, and they are hereby, perpetually enjoined, restrained and prohibited from instituting or prosecuting any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders and circulars, or any or either of them combined.

"Sixth. It is further ordered, adjudged and decreed that all rates, tariffs, circulars and orders heretofore made and issued by said commission, and fully described in Exhibit C to the bill of complaint herein, be, and they are hereby, declared to be unreasonable, unfair and unjust as to complainant and cross-complainant, and they are hereby canceled and declared to be null, void and of no effect.

"Seventh. It is further ordered, adjudged and decreed that all costs herein be taxed against said defendants Reagan, McLean, Culberson and Foster, and the railroad commission of Texas, and that execution may issue therefor."

From that decree the railroad commission and the attorney-general have appealed to this court.

C. A. Culberson, Attorney-General, Henry C. Coke and W. S. Simkins, for appellants. John F. Dillon, E. B. Kruttschnitt, Henry B. Turner, John J. McCook, Winslow S. Pierce, George R. Peck and J. W. Terry, for appellees.

BREWER, J. (*after stating the facts*). The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties.

We are met at the threshold with an objection that this is, in effect, a suit against the state of Texas, brought by a citizen of another state, and, therefore, under the eleventh amendment to the Constitution, beyond the jurisdiction of the federal court.

The question as to when an action against officers of a state is to be treated as an action against the state has been, of late, several times carefully considered by this court, especially in the cases of *In re Ayers*, 123 U. S. 443; 8 Sup. Ct. Rep. 164, by Mr. Justice Matthews, and *Pennoyer v. McConnaughy*, 140 U. S. 1; 11 Sup. Ct. Rep. 699, by Mr. Justice Lamar. In the former of these cases it was said (page 505, 123 U. S., and page 164, 8 Sup. Ct. Rep.):

“To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover not only suits brought against a state by name, but those also against its officers, agents and representatives, where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.”

And in the latter (page 9, 140 U. S., and page 699, 11 Sup. Ct. Rep.): “It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the whole object of such suit be to bring the state within the operation of the constitutional provision which provides that ‘no state shall pass any law impairing the obligation of contracts.’ This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against the state itself.

“In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

“The first class is where the suit is brought against the officers of the state, as representing the state’s action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to

specifically perform its contracts. In *re Ayers*, 123 U. S. 443; 8 Sup. Ct. Rep. 164; *Louisiana v. Jumel*, 107 U. S. 711; 2 Sup. Ct. Rep. 128; *Antoni v. Greenhow*, 107 U. S. 769; 2 Sup. Ct. Rep. 91; *Cunningham v. Railroad Co.*, 109 U. S. 446; 3 Sup. Ct. Rep. 292, 609; *Hagood v. Southern*, 117 U. S. 52; 6 Sup. Ct. Rep. 608.

“The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state. *Osborn v. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *Tomlinson v. Branch*, 15 Wall. 460; *Litchfield v. Webster Co.*, 101 U. S. 773; *Allen v. Railroad Co.*, 114 U. S. 311; 5 Sup. Ct. Rep. 925, 962; *Board v. McComb*, 92 U. S. 531; *Poindexter v. Greenhow*, 114 U. S. 270; 5 Sup. Ct. Rep. 903, 962.”

Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates, is the state, and also because the statute under which the defendants acted, and proposed to act, is constitutional, and that the action of the state officers under a constitutional statute is not subject to challenge in the federal court. We are unable to yield our assent to this argument. So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has, in a pecuniary sense, no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers; and the only direct pecuniary interest which the state can have arises when it abandons its governmental character, and, as an individual, employs the railroad company to carry its property. There is a sense,

doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers, staying the collection of taxes; and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection of taxes, illegal in whole or in part.

Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge; and yet the officers charged with the administration of that valid tax law may so act under it, in the manner of assessment or collection, as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. In *Cunningham v. Railroad Co.*, 109 U. S. 446, 452; 3 Sup. Ct. Rep. 292, 609, it was said:

“Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

“In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him. See *Mitchell v. Harmony*, 13 How. 115; *Bates v. Clark*, 95 U. S. 204; *Meigs v. McClung*, 9 Cranch, 11; *Wilcox v. Jackson*, 13 Pet. 498; *Brown v. Huger*, 21 How. 305; *Grisar v. McDowell*, 6 Wall. 364.”

Nor can it be said, in such a case, that relief is obtainable only in the courts of the state; for it may be laid down, as a general proposition, that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. *Cowles v. Mercer Co.*, 7 Wall. 118; *Lincoln Co. v. Luning*, 133 U. S. 529; 10 Sup. Ct. Rep. 363; *Chicot Co. v. Sherwood*, 148 U. S. 529; 13 Sup. Ct. Rep. 695.

We need not, however, rest on the general powers of a federal court in this respect; for, in the act before us, express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 6 provides that any dissatisfied "railroad company, or other party at interest, may file a petition" "in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant." The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis county, but in Travis county. The language, differing from that which ordinarily would be used to describe a court of the state, was selected, apparently, in order to avoid the objection of an attempt to prevent the jurisdiction of the federal courts. The Circuit Court for the western district of Texas is "a court of competent jurisdiction in Travis county." Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stats. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. Were this, in terms, a suit against the state, if by express statute the state had waived its exemption, and consented that suit might be brought against it, by name, in any court of competent jurisdiction in Travis county, it might well be argued that thereby it consented to a suit brought by a citizen of another state in the Circuit Court

of the United States for the western district of Texas, sitting in Travis county, on the ground that the limitations of the eleventh amendment to the Federal Constitution simply create a personal privilege, which can at any time be waived by the state. However, it is unnecessary to go so far as that, for this cannot, for the reasons heretofore indicated, in any fair sense, be considered a suit against the state.

Still another matter is worthy of note in this direction. In the famous Dartmouth College Case, 4 Wheat. 518, it was held that the charter of a corporation is a contract protected by that clause of the National Constitution, which prohibits a state from passing any law impairing the obligation of contracts. The International and Great Northern Railroad Company is a corporation created by the state of Texas. The charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and, on the other hand, one obligation assumed by the state was that it would not prevent the company from so constructing and operating the road. If the charter had, in terms, granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state, which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied, in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road, and return some profit to those who have invested their money in the construction, is a question not as yet determined. It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation (a citizen of the state) has the right to maintain a suit for the determination of that question, clearly a citizen of another state, who has, under authority of the laws of the state of Texas, become pecuniarily interested in — equitably, indeed, the beneficial owner of the property of — the corporation,

may invoke the judgment of the federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the state in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the Circuit Court is not tenable, and this whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of congress under the sanction of the Constitution of the United States.

Passing from the question of jurisdiction to the act itself there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation. Railroad Commission Cases, 116 U. S. 307; 6 Sup. Ct. Rep. 334. No valid objection, therefore, can be made on account of the general features of this act; those by which the state has created the railroad commission and intrusted it with the duty of prescribing rates of fares and freights, as well as other regulations for the management of the railroads of the state.

Specific objections are made to the act on the ground that, by section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act, and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until, in a direct proceeding, there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if, in a direct

proceeding, the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed, and still unreasonable, to set aside which requires a new suit with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot, and bound to submit to whatever illegal, unreasonable and oppressive regulations may be prescribed by the commission.

It is enough to say, in respect to these matters — at least, so far as this case is concerned — that it is not to be supposed that the legislature of any state, or a commission appointed under the authority of any state, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals, and also that no legislation of a state, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the federal courts, sitting as courts of equity; so that if, in any case, there should be any mistaken action on the part of a state, or its commission, injurious to the rights of a railroad corporation, any citizen of another state, interested directly therein, can find in the federal court all the relief which a court of equity is justified in giving. We do not deem it necessary to pass upon these specific objections, because the fourteenth section, or any other section prescribing penalties, may be dropped from the statute without affecting the validity of the remaining portions, and, if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged — that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out, if that which is left is fully operative as a law, unless it is evident, from a consideration of all the sections, that the legislature would not have enacted that which is within, independently of that beyond, its power. Applying

this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads, and to regulate rates was the prime object of the legislation. This is fully accomplished, whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive, or simply *prima facie*, evidence of what is just and reasonable. The matters of penalty, and the effect, as evidence, of the rates, are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission, and given it power over railroads, without these independent matters. In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties, and the provision as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. Take a similar body of legislation — a tax law. There may be incorporated into such a law a provision giving conclusive effect to tax deeds, and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the state depended for its validity upon the penalties for non-payment of taxes, or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that these two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration.

It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter; insisting that the fixing of rates for carriage by a public carrier is

a matter wholly within the power of the legislative department of the government, and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate, and also, in a reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature, instead of the carrier, prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, and *Peik v. Railway Co.*, 94 U. S. 164, the question of legislative control over railroads was presented; and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller in *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 569; 7 Sup. Ct. Rep. 4, in respect to those cases:

“The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges.”

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S. 307, 331; 6 Sup. Ct. Rep. 334, 348; and, while the right of control was reaffirmed, a limitation on that right was plainly intimated in the following words of the chief justice:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of *Dow v. Beidelman*, 125 U. S. 680, 689; 8 Sup. Ct. Rep. 1028. Again, in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 458; 10 Sup. Ct. Rep. 462, 702, it was said by Mr. Justice Blatchford, speaking for the majority of the court:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 344; 12 Sup. Ct. Rep. 400, is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. New York, 143 U. S. 517; 12 Sup. Ct. Rep. 468, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business—that of elevating grain—was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us the records do not show that the charges fixed by the statute are unreasonable." Hence, there was no occasion for saying anything as to the power or duty of the courts in case the rates, as established, had been found to be unreasonable. It was enough that, upon examination, it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to

deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was, in so doing, only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc. It is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore,

within our power to prepare a new schedule, or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation. If a law be adjudged invalid, the court may not, in the decree, attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass then to the remaining question: Were the rates, as prescribed by the commission, unjust and unreasonable? The bill, it will be remembered, was filed by a second mortgagee. The railroad company was made a defendant, and filed a cross-bill. Each of these bills contains a general averment that the rates are unjust and unreasonable. That the original bill, which was filed April 30, 1892, or some six or seven months after the action of the commission, is in these words:

“ Eighth. That the classifications and schedules of rates and charges so announced and promulgated in and by said commodity tariffs and circulars of said commission, or sought so to be, as hereinbefore shown, are unfair, unjust and unreasonable, and that the same cannot be adopted or put or continued in effect by the defendant company or defendant receiver without serious and irreparable loss to it, and serious and irreparable injury to, and destruction of, the property, rights and interests of your orator and the beneficiaries of its trust, as hereinafter more fully set forth; that the rates so charged and announced by said commission are not compensatory, and are unreasonably low, and that the adoption and enforcement thereof would result, as nearly as can be estimated, in a diminution of revenues derived from the operation of said International and Great Northern railroad, aggregating more than \$200,000 per annum; and that the revenues from said railroad, so reduced and diminished, would be inadequate and insufficient to provide for the payment of the interest upon the prior obligations of the defendant railroad company, recited in paragraph 4 hereof, and the interest upon the second mortgage bonds secured by said mortgage to your orator as trustee, after providing for the expenses of operating said lines of railroad and property, and maintaining

the same in proper order and good working condition, so that the traffic and business of said road, and of every part thereof, shall at all times be conducted with safety to person and property, and with due expedition."

It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character and effect of the rates. Yet it is not to be ignored. There are often, in pleadings, general allegations of mixed law and fact, such as of the ownership of property and the like, which, standing alone, are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled, by particular facts stated therein. It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose, or with the result, of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable. Yet it must be noticed that at first answers were filed, tendering issue upon the matters of fact, and testimony was taken, the extent of which, however, is not disclosed by the record. After that the defendants applied for leave to withdraw their answers, and file demurrers. It is not to be supposed that this was done thoughtlessly. But one conclusion can be drawn from that action, and that is that, upon the taking of their testimony, defendants became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters. Hence, if it appears that the facts stated in detail tend to prove that the rates are unreasonable and unjust, we must assume, as against the demurrers, that the general allegation heretofore quoted is true, and that there are no other and different facts, which, if proved, might induce a different conclusion, and compel a different result.

What, then, are the special facts disclosed in the several bills? It appears that there is a bonded indebtedness of over \$15,000,000, and, in addition, capital stock to the amount of \$9,755,000; that the bonds and stock were issued for, and represent, value; and

that the rates theretofore existing on the road were not sufficient to enable the company to pay all the interest on the bonds. At the time suit was commenced the first mortgage bonds outstanding amounted to \$7,054,000, drawing six per cent interest; the second mortgage bonds, to \$7,954,000, drawing also six per cent interest. The stockholders had never received any dividends whatever upon their investment, but, on the contrary (as appears from the cross-bill filed subsequently to the commencement of the suit), they had been forced to pay a cash assessment of over \$1,000,000, or about twelve per cent of the face value of the stock, for the purpose of providing in part for the interest upon the first mortgage bonds. The holders of those bonds had been compelled to accept, and had accepted, in payment of one-half of the accrued and defaulted interest — a sum exceeding \$750,000 — deferred certificates of indebtedness bearing interest at the rate of five per cent. The holders of the second mortgage bonds had been called upon to fund, and substantially all had consented to fund, past due interest amounting to upwards of \$1,250,000, in third mortgage bonds, bearing four per cent interest; and they had also been required to reduce, and substantially all had agreed to reduce, the interest on their bonds to four and a half per cent per annum for the period of six years, and thereafter to five per cent per annum. For about three years the road had been in the hands of a receiver appointed on account of the default of the company in the payment of its obligations. A statement in detail was incorporated in the bill, of the earnings and operating expenses of the road during the years 1889 and 1890, and the first nine months of 1891, which was supplemented by a like statement in the cross-bill subsequently filed of the earnings and expenses for the entire year 1891 and the first three months of 1892. These statements show the following figures:

1889: Earnings.....	\$3,488,185	14
Operating expenses, exclusive of taxes...	2,629,452	90
Surplus	858,732	24
1890: Earnings	3,646,422	33
Operating expenses, exclusive of taxes...	3,148,245	09
Surplus	498,177	24
1891: Earnings.	3,648,641	79
Operating expenses, exclusive of taxes...	3,093,550	20
Surplus	555,091	59

Three months of 1892:

Earnings	\$759,176 18
Operating expenses, exclusive of taxes...	829,074 87
Deficit	<u>69,898 69</u>

The bill also contains a tabular statement of the revenue per ton per mile derived from the operation of the road during the years 1883 to 1893, inclusive, as follows:

Revenue per ton per mile for 1883 (in cents).....	2.03
“ “ “ 1884.....	1.90
“ “ “ 1885.....	1.71
“ “ “ 1886.....	1.65
“ “ “ 1887.....	1.38
“ “ “ 1888.....	1.33
“ “ “ 1889.....	1.44
“ “ “ 1890.....	1.38
“ “ “ 1891 (first nine months) ...	<u>1.30</u>

The mileage owned and operated by the company within the state of Texas amounts to 825 miles. There had been necessarily expended, in cash, in the construction and equipment of its road, more than \$50,000 per mile, and it could not be replaced for less than \$30,000 per mile. There is also this allegation in the cross-bill:

“That the lines of railway of your orator's company have at all times been operated as economically as practicable, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for your orator to operate said road for less than it has been operated; that for the year ending June 30, 1892, there were employed by your orator's company seventeen general officers, who received during said year an average daily compensation of \$12.64, and, exclusive of its general officers, all of its employees, during and for the year ending June 30, 1892, received an average daily compensation of \$2.01, and that at all times your orator has secured the service of its officers and employees as cheaply as practicable, and has employed no more than necessary, and that the above were fair

and reasonable rates of pay; that at all times the International and Great Northern Railroad Company has secured all supplies, material and property, of whatever character, for the operation of its road, at the cheapest market price, and at as low rates as the same could be secured, and has secured and used no more than actually necessary in the operation of the road."

In the amendment to the cross-bill, filed in March, 1893, is given a table showing the actual reductions in amounts received by the railroad company for the transportation of the different classes of goods under the operation of the new tariffs up to August 31, 1892, and amounting to \$159,694.51, and also a table showing the per cent of reductions as to different articles, varying from five per cent, on cement, to fifty-four and ninety one-hundredths per cent on grain in carloads. The bill also, in general terms, negatives the probability of any increase in amount of business to compensate for the reduction in rates, a negation sustained by the figures given in the amended bill as to the actual effect upon the receipts. It also contains a general averment that the rates on interstate business would be injuriously affected to an equal amount by reason of the reduction of rates on business within the state.

As against these facts the attorney-general presses these matters: In the table in the bill heretofore referred to, showing earnings and expenses during the years 1889 and 1890, and the first nine months of 1891, there is this item, several times repeated, "Balance of income account;" and this on September 30, 1891, is stated at \$3,795,785.68. Of what this account is composed, we are not informed. Possibly, there was included within it the proceeds of the land grant, which, as we are told, was made by the state to the corporation. But, whatever it includes, it was on January 1, 1889, as stated, \$2,612,118.68, which would make the increase of that account during the two years and nine months to be \$1,183,667. Confessedly, no interest was paid during those years, and that amounted each year to something like \$900,000, or nearly \$2,500,000 for the two years and nine months. It is obvious that, no matter what may have been in the bookkeeping of the company included in this account, or how much, or from what sources, in prior years, the road had accumulated this balance, the increase during the time stated did not equal the accruing interest.

The attorney-general also notices the report for the year ending June 30, 1892, made by the company to the railroad commission, a copy of which is attached as an exhibit to the amendment to the cross-bill; and from that he tabulates a statement which, as he contends, shows that the earnings during that year were sufficient to pay the operating expenses and fixed charges. We give the table as he has prepared it:

Gross earnings from operation.....	\$3,568,690 26
Less operating expenses.....	2,986,204 12
	<hr/>
Income from operation.....	\$582,486 14
To which should be added amounts expended for "cost of road, equipment and permanent improvements," admitted to have been included in operating expenses.....	302,085 77
Dividends on (compress) stocks owned.....	8,020 00
	<hr/>
Total income.....	\$892,591 91

Deductions from Income.

Interest on funded debt accrued during the year, viz.:

On \$7,954,000 first mortgage bonds at six per cent.....	\$477,240 00
On \$7,054,000 second mortgage bonds, one month, at six per cent.	35,270 00
On \$7,054,000 second mortgage bonds, eleven months, at four and one-half per cent.....	290,977 50
	<hr/>
Total interest accrued.....	\$803,487 50
Rental paid Colorado River Bridge Company	14,583 32
Taxes	28,951 35

Total deductions.....	847,022 17
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Surplus after paying operating expenses proper, interest accrued on bonds, taxes, etc.....	\$45,569 74
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But this table ignores that which is disclosed in the cross-bill, to wit, \$750,000 in certificates of indebtedness, bearing interest at five per cent, and \$1,250,000 third mortgage bonds, bearing four per cent interest, the interest on which sums would exceed all the apparent surplus. These items also appear in the report, under the head of "Current liabilities," the total balance of which on July 1, 1892, is given as \$3,772,062.94, which sum may not unreasonably be taken as showing by how much the company has fallen short of paying its operating expenses and fixed charges. Again, the sum of \$302,085.77 appears in that table, under the description "Cost of road, equipment and permanent improvements, admitted to have been included in operating expenses," and is added to the income as though it had been improperly included in operating expenses. But, before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of \$302,085.77 is one of \$113,212.09 for rails; and it appears from the same report that there was not a dollar expended for rails, except as included within this amount. Now, it goes without saying that in the operation of every road there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called "permanent improvements," or by any other name, but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of "Renewals of Rails and Ties," is stated the number of tons of "new rails laid" on the main line. Other items therein are for fencing, grading, bridging and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company. Certainly, the mere title under which these expenditures are once stated, is not sufficient to overthrow the facts—so fully and clearly shown—that the stockholders have never received any dividends; that in order to meet the accumulating interest on the bonds they have had to put their hands in their pockets and advance a million

and over of dollars. Those are facts whose significance cannot be destroyed by any mere manner of bookkeeping or classification of expenditures.

Further, the attorney-general asserts that there are five trunk lines, of which the International and Great Northern road is one, paralleling each other, and thus dividing the business of the territory through which they pass; that the state of Texas had made large donations of land to railroad companies; and that, as appears from its executive documents, this railroad company had received a donation of 3,352,320 acres to aid in its construction, as well as exemption of all its property from taxation for twenty-five years. He also calls attention to the financial depression which has of late years pervaded every avenue of trade, and adds a table from the report of the commissioner of agriculture of Texas, showing, as to different articles produced in that state, an increase in the amount of product, and a decrease in the prices received therefor, all of which considerations, he earnestly insists, affect the question of the reasonableness of the rates prescribed.

None of the matters mentioned in the foregoing paragraph appear in the pleadings, or elsewhere in the record, and it is, therefore, doubtful to what extent they may be taken into consideration. If we may take judicial notice of the five parallel roads, must we also assume that the existence of the other four diminishes the business of the International and Great Northern, and that, if they had never been built, all the business which now passes over the five would have been carried by the one? May not the topography of the country be such as to prevent any of the business of the other roads from ever coming to the International and Great Northern, even if, without them, it was obliged to seek water or wagon transportation? May not the building of those other roads have increased the population and business to such an extent that the overflow has, so far from diminishing, really resulted in an increase of, the business of the International and Great Northern? If there has been a division of business, has there not also been a competition by which the rates have been reduced, and reduced to such an extent as to forbid the propriety of any further reduction? If we may take judicial notice that the state made a grant of 3,000,000 and odd acres to the company, must we also take notice of the value of

that land, of its sale, and the amount realized therefrom? While, undoubtedly, there has been lately a period of financial depression, can we take judicial notice of the extent to which that depression has reduced the prices of the products of the state? And is the report of the commissioner of agriculture of the state to be considered as evidence before us, and accepted as substantially correct, both as to product and prices? And if the depreciation of prices, as stated in said report, be accepted as correct, will such depreciation uphold a compulsory reduction of the rates of transportation to such an extent that some of those who have invested their money in railroad transportation receive no compensation therefrom? Is it just to deprive one party of all compensation in order that another may make some profit? They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the state of Texas have been operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business which cannot be abandoned at will, to so reduce their charges for service as to make the carrying on of that business result in a continued loss. In the one case the law is powerless to prevent injury. In the other it is used to work injury. Counsel suggest that the state itself may construct and operate railroads, and then may properly make rates so low that the business is done at a loss. They refer to the postal system of the United States, which, carried on for the common welfare, not infrequently results in a loss, which is made good out of the public treasury. But the parallel is not good. In the case suggested the loss is cast, through taxation, upon the general public, and all bear their proportionate share of that loss which is incurred in securing a common benefit, while the scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should, by law, be compelled to suffer loss that others may make gain. If the state were to seek to

acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation — that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title, but the use, for the public benefit, at less than its market value?

The act of 1853, to which reference has already been made, contained a section looking to the acquisition by the state of the title to railroad property. Section 17 of the act (Gen. Laws Tex. 1853, p. 58) is as follows :

“If the legislature of this state shall at any time make a provision by law for the repayment to any such company of the amount expended by them in the construction of said road, together with all moneys for permanent fixtures, cars, engines, machinery, chattels and real property then in use for the said road, with all moneys expended for repairs or otherwise, and interest on such sums at the rate of twelve per centum per annum, after deducting the amount of tolls, freights, passage money and all moneys received from the sale of lands donated by the state to said company, with twelve per centum per annum interest on all such sums, then the road, with all its fixtures and appurtenances aforesaid, and all the lands donated to the same by the state and remaining unsold, shall vest in and revert to the state, provided, that the state shall not be required to pay or allow a greater rate of interest on any amount of the money so expended by any company which shall have been borrowed from this state than the state shall have received for the same from such company.”

This section, as will be perceived, provides for the payment of interest at the high rate of twelve per cent on the difference between what the company has paid out and what it has taken in, and to that extent evidences the thought of the state that justice required the return to the builders of railroads of something more than the actual cost, as the condition of depriving them of the title. It is only significant, however, as an expression of the thought of the state at the time; for, were the provision ever so unjust, every corporation which, after the passage of the act, invested its money in building a road, would do so with the

knowledge that that was the condition upon which the investment was made, and could not, therefore, challenge its validity.

And now what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000. It cannot be replaced to-day for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest, the stockholders have put their hands in their pockets, and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employees have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate, in cents, per ton, per mile, has decreased in ten years from two and three-hundredths to one and three-tenths. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over \$150,000. Can it be that a tariff which, under these circumstances, has worked such results to the parties whose money built this road, is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such

a tariff. There may have been extravagance, and a needless expenditure of money. There may be waste in the management of the road, enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value. The road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff, as established, is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing, until the aggregate decrease has been more than fifty per cent; that, under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment, so supported, will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree restraining it being put in force.

It follows from these considerations that the decree, as entered, must be reversed, in so far as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations, but must be affirmed so far only as it restrains the defendants from enforcing

the rates already established. The costs in this court will be divided. Decree accordingly.*

1. Railroad companies — regulation of charges by state — reasonableness of charges.— On the regulation of the charges of railroad companies, either directly by the legislature or through a commission, see generally *Chicago, etc., R. Co. v. Minnesota*, 2 Am. R. R. & Corp. Rep. 564, and note; *Wellman v. Chicago & Grand Trunk R. Co.*, 3 Am. R. R. & Corp. Rep. 703; *Budd v. New York*, 5 Am. R. R. & Corp. Rep. 610; *Chicago & Grand Trunk R. Co. v. Wellman*, 5 Am. R. R. & Corp. Rep. 638; *Commonwealth v. Covington & C. Bridge Co.*, 7 Am. R. R. & Corp. Rep. 638. At the same time that the principal case was decided four other cases were disposed of involving the same questions. *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; 14 Sup. Ct. Rep. 1060; *Reagan v. Mercantile Trust Co.* (two cases), 154 U. S. 418; 14 Sup. Ct. Rep. 1062; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420; 14 Sup. Ct. Rep. 1062. In the first of these cases it is intimated that the determination of a question as to the reasonableness of rates for carriage imposed by a state upon a railroad company may be affected by the fact that part of the railroad owned and operated by it is outside the state.

In *Railroad Commissioners v. Pensacola & A. R. Co.*, 24 Fla. 417 (1888), the railroad company filed a bill against the railroad commissioners of Florida to enjoin them from promulgating as binding certain specified rates or any rates substantially similar, and also from instituting suits against the complainant for penalties for charging and receiving more than such rates. The court held that this was not a suit against the state as to the first part of the relief prayed, but was as to so much of the relief prayed as related to suits for penalties. It was also held in the same case that the act creating the board of commissioners invested them with a discretion in the matter of establishing rates, that the courts could not control this discretion, that the reasonableness of rates established by the commission was not open to investigation in such a suit, and that, if injustice was done by the rates established, some other remedy must be sought. In the subsequent case of *Pensacola & A. R. Co. v. State*, 25 Fla. 310 (1889), which was a suit to recover a penalty for charging and receiving more than the rates established by the commission, it was held that the establishment of a tariff of freight and passenger rates which would not pay operating expenses was an abuse of the discretion to prescribe just and reasonable rates, and amounted to a taking of the company's property without just compensation; that when there is room for difference of opinion as to whether a tariff of rates will prove remunerative or not, the court will not interfere, but leave the rates to the test of experience; and that the court will not interfere with some part or parts of the tariff of rates, when the same are not assailed as an entirety.

See, also, *Board of Railroad Commissioners of Kansas v. Symms Grocer Co.*, post.

2. Power of state to regulate the charges of federal railroad corporations with respect to interstate traffic.— In *Reagan v. Mercantile Trust*

* Reported in 154 U. S. 362; 14 Sup. Ct. Rep. 1047.

Co., 154 U. S. 413; 14 Sup. Ct. Rep. 1060, this question arose and it was therein held that a railway corporation created by act of congress is subject to the control of a state, as to reasonable rates for transportation wholly within the state, where nothing in the act creating it indicates an intent to remove it from such control, and the enforcement of such rates will not disable it from discharging all the duties and exercising all the powers conferred by congress. The court says: "The Texas and Pacific railway is a corporation organized under the laws of the United States (16 Stat. 573); and by reason of that fact it is earnestly insisted by counsel for it and the trust company that it is not subject to the control of the state, even as to rates for transportation wholly within the state. The argument is that it receives all its franchises from congress; that among those franchises is the right to charge and collect tolls; and that the state has not the power, therefore, in any manner, to limit or qualify such franchise. This is an important question, and deserves consideration, even though, in respect to other matters, the facts should present a case exactly parallel to that just decided, and calling for a like decision, because, if the state has no control in the matter, the decree should not be affirmed in part, but in toto.

"We are of the opinion that the contention of the railway and trust companies cannot be sustained, and that the reasoning in the cases of Thomson v. Railroad Co., 9 Wall. 579, and Railroad Co. v. Peniston, 18 Wall. 536, leads to this conclusion.

"In the first of those cases these facts appeared: The Union Pacific Railway Company (Eastern Division), a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road, to become one link in the transcontinental line known as the Union Pacific system. After its construction, the legislature of Kansas having enacted a law laying certain taxes upon its property, a bill was filed to restrain the collection of those taxes, on the ground that the property of the company was mortgaged to the United States, and that it, under the congressional grant, was bound to perform certain duties, and ultimately pay five per cent of its net earnings to the United States — an obligation which would be greatly hindered if the taxes imposed should be collected. But this contention was not sustained, and while it was said by the chief justice, delivering the opinion of the court, that congress had the power to provide an exemption from state taxation in such a case, there was no exemption in the absence of legislation to that effect. This decision was followed by that in the other case, in which a like exemption was sought of the property belonging to the Union Pacific Railroad Company — a corporation created, like the Texas and Pacific Railway Company, by an act of congress, and also, like the Kansas company, aided by the government in lands and bonds — but here, too, by a majority of the court, the claim of exemption was denied. * * * Similarly, we think it may be said that, conceding to congress the power to remove the corporation, in all its operations, from the control of the state, there is in the act creating this company nothing which indicates an intent on the part of congress to so remove it, and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all

the powers conferred by congress. By the act of incorporation, congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere, by the Federal Constitution, given to congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state; and if it deemed that the interests of the nation, and the discharge of the duties required on behalf of the nation from this corporation, demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the state passed in 1873 in respect to it, we are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

BOARD OF RAILROAD COMRS. OF STATE OF KANSAS ET AL. V.
SYMNS GROCER Co. ET AL.

(Supreme Court of Kansas, January 6, 1894.)

1. RAILROAD RATES. BILL OF SHIPPER TO ENJOIN THE ADOPTION AND ENFORCEMENT OF RATES FIXED BY RAILROAD COMMISSIONERS. The board of railroad commissioners made a finding and decision reducing rates of freight upon carload lots of sugar, coffee, beans and canned goods, making them considerably less than the rates upon the same commodities when shipped in less than carload lots. A shipper, whose business mostly required the use of the rates fixed for less than carloads, and who claimed that the proposed rates would operate to his injury and to the benefit of other shippers who would use the carload rates, brought an action against the board to enjoin it from promulgating and putting in force the new schedule of rates, contending, not that they were unreasonably low or unremunerative to the carrier, but that the enforcement of them, without making a reduction of the rates for the shipment of smaller quantities, was a discrimination against him which should be enjoined. Held, that the plaintiff had no such interest as entitled him to enjoin the board from putting in force its finding and decision, and that he was not entitled to the relief demanded.

THIS was an action of injunction to prevent the promulgation and enforcement of a revision of the freight rates made by the board of railroad commissioners, by which the rates on car-

load lots of sugar, coffee, beans and canned goods were reduced. The action was brought by the Symns Grocer Company of Atchison, on behalf of itself and others similarly situated, against the board of railroad commissioners, the Missouri Pacific Railway Company, the Atchison, Topeka and Santa Fe Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, the Kansas City, Ft. Scott and Memphis Railway Company, the Missouri, Kansas and Texas Railway Company and the Union Pacific Railway Company. The grocer company, in its petition, alleges substantially that it was engaged in jobbing sugar, coffee, beans and canned goods throughout the state of Kansas, and that there were a number of other parties, located in Atchison, Leavenworth, Kansas City, Kans., and Ft. Scott, engaged in a like business, whose interest it is to distribute commodities throughout the state in less than carload lots; and that they had expended large sums of money in securing permanent facilities required by their business, and all are interested in the relief sought. It is further averred that heretofore there had been established and maintained rates relatively reasonable and just between carload and less than carload lots of the commodities named, under which it was immaterial whether goods were shipped in carload or less than carload lots; and that the plaintiff had built up and established a large business in the interior of the state, relying upon their right under the law to the continuance of reasonable and non-discriminating rates, and upon the belief that the board would never make any unfair or unreasonable discrimination between carload lots and smaller quantities of such goods. That prior to March 1, 1892, there were established at the cities of Salina, Hutchinson, Wichita and Arkansas City firms, persons and corporations engaged in a similar business to that of plaintiff, who were competitors of plaintiff and others engaged in the business of selling job lots of the articles named, and as such came in direct competition with the plaintiff, and were entitled to equal and just rates on the lines of railroad without discrimination in favor of or against plaintiff. That, instead of this, the board of railroad commissioners, on March 5, 1892, made and promulgated an order reducing the rates on sugar in carload lots from Atchison and the other jobbing points in eastern Kansas to fifteen cents per 100 pounds and making the rate on canned goods,

coffee and beans in carload lots twenty-two cents to Salina, twenty-five cents to Hutchinson and Wichita, and twenty-eight cents to Arkansas City; whereas the rate on less than carload lots was permitted to remain at thirty-four cents per 100 pounds to Salina, forty-one cents to Wichita and Hutchinson, and forty-nine cents to Arkansas City. That the reasonable difference between rates in carload and less than carload lots should not exceed five cents per 100 pounds, and that the rate established was unreasonable and discriminating, and, if made effective, would injure and destroy the business which had been built up by the plaintiff. It was further alleged that the making of the order was a covert and unlawful attack on the rights of the plaintiff under the interstate commerce laws of the United States. The Bittman-Todd Grocer Company and Rohlfing & Co., wholesale grocers of Leavenworth, were, on their own application, made parties to the action, and joined the plaintiff in asking the relief prayed for in the petition. The answer filed by the board of railroad commissioners recited the facts which led up to the making of the order complained of, and alleged that the rates established by it were reasonable, just and non-discriminative; and, further, that they stood ready at all times to hear, consider and determine any matter of freight rates connected with the business done by the plaintiffs within the state of Kansas, and to adjust the same so that they might be reasonable, just and equitable. The Chicago, Rock Island and Pacific Railroad Company answered, alleging that the rates established were unjust and unreasonable, and, further, that they would not afford the railroad company a just and reasonable compensation for carrying the commodities between the points named in the order. The answers of the Union Pacific Railway Company and the Missouri, Kansas and Texas Railway Company were substantially the same. So was that of the Missouri Pacific Railway Company, which contained the further averment that the commodities named in the order were produced outside of Kansas, and were the subject of interstate commerce, over which the board had no jurisdiction to establish the rates sought to be fixed by its order. The Atchison, Topeka and Santa Fe Railroad Company filed an answer, disclaiming any interest in the controversy except to learn what was required of it by law, and alleging that the interior jobbers at Wichita, Hutchinson, Salina and Arkansas City, upon

whose complaint the order was made, were interested, and should be made parties to the cause. The interior jobbers did intervene, and filed an answer, which, among other things, alleged that the rates established by the board of railroad commissioners upon the commodities named in its order were just and reasonable, and not discriminative. When the action was instituted a temporary injunction was granted by the court, and afterwards a motion to dissolve this injunction was made by the board of railroad commissioners and the interior jobbers upon the grounds: First, that the court had no jurisdiction to entertain the action or to grant the injunction; second, that the amended petition filed in the action did not state facts sufficient to constitute a cause of action; and, third, that the allegations of the petition were not true, except as admitted in the answers of the defendants. A hearing of this motion was had by the court on August 13, 1892, when it determined that the injunction should be continued, and, therefore, overruled the motion to dissolve the same. Of this ruling the plaintiffs in error complain.

L. Houk, Geo. R. Peck, A. A. Hurd, Robert Dunlap, T. F. Garver, and Edwin White Moore, for plaintiffs in error. *Rossington, Smith & Dallas, John C. Tomlinson and Henry Elliston*, for defendants in error.

JOHNSTON, J. (*after stating the facts*). For several months prior to March 5, 1892, the board of railroad commissioners had been considering the complaint of the wholesale merchants of Wichita, Hutchinson, Salina and Arkansas City that the freight rates upon certain merchandise were excessive, unreasonable and unjust. After considerable controversy with the railroad companies, the board finally reached the decision that the carload rates on sugar, coffee, beans and canned goods were too high, and upon the date named a finding and decision were announced fixing the carload rates from the eastern cities of the state to the interior cities which have been named on sugar at fifteen cents per 100 pounds, and on the other commodities which have been mentioned a rate of twenty-two cents to Salina, twenty-five cents to Wichita and Hutchinson, and twenty-eight cents to Arkansas City. The decision was to become effective on March 16, 1892, but before that time, and upon the application of the Symns Grocer Company, a

wholesale dealer at Atchison, a temporary order was obtained, enjoining the board of railroad commissioners, as well as the railroad companies, from putting in force the schedule of rates which the board had established. There was considerable testimony taken with respect to the cost of transportation of the commodities named, and what were reasonable charges for the same, and also as to the difference in the expense of transporting such merchandise in carload lots and in less quantities, as well as the difference in charges usually made between the two methods of transportation. We have examined this testimony, but the view which we take renders an analysis of the same unnecessary. At the outset, the right of the plaintiff below, a shipper, to maintain an action enjoining the board of railroad commissioners and preventing the promulgation and enforcement of their order, is challenged. There is no contention by the plaintiff below that the rates established are too low, nor that they are unremunerative to the carrier. None of the railroad companies have appeared here except the Atchison, Topeka and Santa Fe, and it has filed a cross-petition, alleging that the court erred in granting and in sustaining the order of injunction. The rates which were fixed by the board must, therefore, be regarded as just and reasonable in themselves; and the only complaint is that other rates are too high, and, therefore, the board should not be permitted to put one schedule or revision in force until another schedule has been revised and reduced. The rates established are open alike to the plaintiff below and all other shippers who desire to send merchandise in carload loads. Can a shipper who anticipates that at some time he will send goods in smaller quantities tie the hands and stay the action of the board which has entered upon a revision of rates, and has established a schedule for carload lots, which of itself is confessedly just, because it has not yet reached and revised a rate for shipments of like merchandise under different conditions and in smaller quantities? We think not. It is well settled that it is competent for the state legislature to establish rates and classifications to be charged by railroad companies for the transportation of passengers or freight between points on their line within the state, and also that this power may be largely delegated to boards of commissioners. *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418; 10 Sup. Ct. Rep. 462, 702;

Budd v. New York, 143 U. S. 517; 12 Sup. Ct. Rep. 468. Under the act of 1883, as since amended, a code of rules is provided for the regulation and control of railroads, and it confers upon a board of railroad commissioners the power to establish or revise rates of transportation; and the finding and adjudication of that board as to rates is to be accepted by the railway company, posted up in the depots on the line of its road, and taken as a reasonable compensation for the service for which they are provided, until the contrary is proved. The finding and adjudication of the board is *prima facie* evidence of the matters therein stated, and of what is a reasonable charge in all actions for such service. Gen. Stat. 1889, pars. 1334, 1337, 1339, 1341. The classification of freights and the adjustment of rates so devolved upon the board is a matter of considerable difficulty, as it involves so many elements, and is affected by so many circumstances. In determining what are reasonable and just rates much discretion is necessarily invested in the board, and, so long as it acts within the limits of that discretion, its acts cannot be enjoined or interrupted. The courts cannot trench upon its jurisdiction, nor exercise the discretion and power vested in it. Members of that tribunal are presumed to have been chosen with reference to their judgment, discretion and special fitness; and it is presumed that by special study and experience they will become qualified to master the details and intricacies of rates and tariffs. Much of the information respecting transportation is under the control of the railroad companies, and not accessible to the occasional patron of the roads; and hence the commissioners are created with the right to inquire, to classify and to decide. Although not clothed with all the functions of a court, they are authorized to determine what are just and reasonable rates. In a certain sense they stand as guardians of the public for the protection of shippers and patrons. Their determination is binding and conclusive unless the railroad companies can show that their findings and decisions are unjust and unreasonable. It can hardly be that the decision of a board so constituted, which is applicable to the entire state, can be stayed or set aside at the suit of an individual for whom no service has yet been performed, and who may or may not bring himself within the operation of the decision. The schedule

of rates sought to be enjoined is designed for the whole state, and for all who may desire to avail themselves of it. Every shipper, and, indeed, every purchaser, of the commodities shipped under the schedule established will be more or less affected by it. It is a matter of public concern, and a private individual cannot invoke the extraordinary remedy of injunction unless he has some personal and peculiar interest not shared by the public. As has been said: "It is not enough that his damages are greater than those sustained by the general public, thus differing only in degree; but they must be different in kind." *Commissioners v. Smith*, 48 Kans. 333; 29 Pac. Rep. 565, and cases cited. The Symns Grocer Company may, by virtue of its larger facilities, be affected in a greater degree than other shippers in the state, but the injury, if there be one, does not differ in kind from that suffered by other shippers throughout the state who may utilize the rate in the transportation of merchandise. The matter, then, being a question of public interest, decided by a public quasi judicial tribunal, it would seem that a private shipper could not maintain an action to enjoin the announcement and enforcement of the decision of the board; but if, for any cause, an action would lie, it should be brought in the name of the state on the relation of some public officer. Every time a schedule of rates applicable throughout the state is changed, the interests of a great many are necessarily affected. A change may operate beneficially as to some, while as to others it may not be as favorable as were the pre-existing rates. Can it be that some one of the thousands of individuals affected may challenge the reasonableness of the rate made, and maintain an action in his own name to prevent the board from putting into operation such a state schedule until he can have an adjudication as to whether it injuriously affects him? It has been well said that, if one shipper may maintain the action, another shipper, liable to be affected by the rate, living in another part of the state, may likewise maintain the action; and in this way there might result a conflict in the various courts of the state. The District Court in one county might find the order or rate reasonable, while the District Court in another county might find it unreasonable. One court might enjoin the enforcement of the decision, and another decide that it should be put in operation. These illustrations only

show the confusion that might arise if an individual or shipper who has no special interest should be allowed to enjoin the putting in effect of such a decision.

We are cited to cases where injunction was maintained by the railroad company against the enforcement of the order of such a board, but in these cases it was held to be maintainable because the rates proposed to be put in force were so unreasonable as to be confiscatory. The railroad company, being a public carrier, and obliged to transport commodities offered for shipment, and use their property in so doing, it was held that a provision requiring the carriage of persons or property without reward amounted to the taking of private property for public use without just compensation, or without due process of law, and hence a court of equity might prevent the enforcement of such a provision. *Railway Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., Ry. Co. v. Minnesota*, *supra*; *Budd v. New York*, *supra*. The shipper, however, who is not compelled to ship, does not stand in such a position. He may utilize the rate prescribed, or he may not; and, if an injury is inflicted, it is not one peculiar to himself. Our attention is also called to *Scofield v. Railway Co.*, 43 Ohio St. 571; 3 N. E. Rep. 907, but, as will be seen, that was not a case against a board of railroad commissioners, but was an action against a railway company to prevent a plain discrimination against particular individuals. We are referred to no case which can be regarded as a precedent for the claim made in the one at bar. As has been said, the rates sought to be enjoined are not claimed to be unreasonably low, but the complaint is that the enforcement of the same would operate injuriously to the plaintiff below, unless a corresponding reduction was made in the rates for the shipment of less than carload lots. It may be that the rates upon smaller quantities should be reduced, and it may be that the disparity between the two classifications is so great as to result to the detriment of some of the shippers. If that be the case, the plaintiff is not without remedy. The board of railroad commissioners is a continuous body, and presumably is open at all times for the readjustment of rates, or to correct any inequalities which the practical operation of a rate or regulation may disclose. The construction of new roads, the building of trade centers, and the development of the country

necessarily cause a disturbance of rates; and when such changes occur, and new circumstances arise, the board may be required to revise and change existing rates. It is conceded by all that a distinction may be made between the carriage of commodities in carload lots and in less quantities. The reasons for making such classification are easily seen. It is clear that the enforcement of a reduction of rates upon one class ought not to be prevented by judicial interference because the board has failed to reduce the rate upon another class. Under various provisions of the statute application may be made to the board to adjust the rates charged for the class which would embrace the shipment of smaller quantities of the commodities in question. The fact that there may be too great a disparity between the rates charged for the two classes can hardly be treated as a statutory discrimination within the meaning of section 10 of the act providing for the regulation and control of railroad companies. It prohibits a railroad company from charging or receiving a greater sum from one than another "for a like service from the same place, or upon like conditions and under similar circumstances." The difference in conditions and circumstances appears to afford sufficient ground for a different classification and a different charge. But, if the classification operates prejudicially to the interests of the complaining parties, they may appeal to the board to adjust the rates and correct any inequality that may exist. The same statute affords a complete remedy for any discrimination that may be made. In this respect it operates as a substitute for the remedy which existed at common law. In *Beadle v. Railroad Co.*, 51 Kans. 248; 32 Pac. Rep. 910, it was decided that by this act the legislature had not only given to the shipper all his remedy at the common law, but had given him a much better and broader one, whereby he was permitted to recover three times the excess of any overcharge exacted by the common carrier, or treble damages, with attorney's fees and costs. It was said that the legislature intended that this statute should supersede the common law concerning unreasonable prices or excessive charges, and that a shipper would not be permitted to waive the statute and avoid its limitations by an action at common law; and that, a full remedy being given, the parties are and ought to be confined to it.

There is no reason for the claim that the decision of the board

is an unlawful interference with interstate commerce. By its terms it is limited to shipments from one point to another within the state, and cannot be construed to affect, or as an attempt to affect, interstate transportation. It follows from what has been said that the order and judgment of the District Court must be reversed. All the justices concurring.*

As to the propriety of making a distinction between shipments of any commodity in carloads and less than carloads, see note to *Hoover v. Pennsylvania R. Co.*, ante, p. 282. As to relief by injunction against discriminative rates and against the enforcement of rates fixed by railroad commissioners, see note to *Seawell v. Kansas City, etc., R. Co.*, ante; *Reagan v. Farmers' Loan & Trust Co.*, ante.

CITY OF ABILENE V. COWPERTHWAIT.

(Supreme Court of Kansas, November 11, 1893.)

1. MUNICIPAL CORPORATIONS. LIABILITY FOR INJURIES CAUSED BY A DEFECTIVE TRAPDOOR IN A SIDEWALK, CONSTRUCTED BY ABUTTING OWNER UNDER LICENSE FROM CITY. The corporate authorities of a city permitted a lotowner to make a dangerous cellarway in a sidewalk and street in front of his house, which he subsequently covered with a frail trapdoor that was defective in construction, and around which no safeguards were placed. It remained in this condition for about two months, when a person traveling over the sidewalk stepped upon the trapdoor, which broke down, and precipitated him into the excavation below, causing severe personal injuries. Held, that the city cannot relieve itself from responsibility because the dangerous and unguarded opening was made and covered by the lotowner; that it was the duty of the city authorities to supervise the work of covering the cellarway, and to cause the use of suitable precautions to prevent accidents; and that under the facts and circumstances of the case the city was negligent, and liable for the injury sustained.

2. NEGLECT TO SUPERVISE CONSTRUCTION. NOTICE OF DEFECT. Where a diligent performance of the duty of supervision in the construction of a covering over a perilous excavation in a street would bring knowledge to the officers of the defect and the dangerous character of the same, a want of such knowledge is negligence.

Stambaugh & Hurd, for plaintiff in error. *J. H. Mahan and Burton & Moore*, for defendant in error.

* Reported in 35 Pac. Rep. 217.

JOHNSTON, J George W. Cowperthwait fell through a sidewalk on one of the principal streets of Abilene, which was constructed over an excavation, and was severely injured. Business houses fronted upon the sidewalk, which was built of wood. Prior to February, 1888, an owner of abutting property was permitted to have an opening in the sidewalk for a cellarway, about six feet long and two feet and four inches in width, which he used as an entrance into the basement of the building. For a time the opening was inclosed with a wooden railing, but in February, 1888, the owner placed a frail covering over the opening, after which the railing was removed. The covering or door was constructed of two by four scantling, placed lengthwise of the opening, about eighteen inches apart, upon which were nailed inch boards about twenty-eight inches long. This trapdoor was loosely placed over the opening, the north end resting upon the upper step of the stairway leading into the basement, and the south end resting upon a scantling or board nailed to one of the stringers supporting the sidewalk. In the following month, Cowperthwait, while passing along the street, met two other persons at the point where the trapdoor had been placed in the walk, and, while standing upon it, conversing with them, the south end gave way and fell down, throwing him into the excavation below. The jury found that the accident and injury resulted from the negligence of the city, and awarded Cowperthwait damages in the sum of \$2,100.

The city contends that the testimony produced is insufficient to sustain the verdict and judgment. It clearly appears to us that the trapdoor was defectively constructed, and, without a railing or other protection, made the sidewalk unsafe for public travel. It is true that the perilous opening in the sidewalk was made, and the railing which was once there removed, by the adjoining owner, and not by the city; but the corporate authorities are vested with full control of the streets and sidewalks, and are required to maintain them in a reasonably safe condition for public travel. The city cannot escape liability by permitting the owner to make a dangerous and unguarded opening in the sidewalk. It was unquestionably negligent in allowing a dangerous cellarway to be constructed in the sidewalk, "and nothing will wholly terminate the negligence of the city except to so close up

the cellarway as to make it permanently and constantly safe for those traveling on the sidewalk." *Smith v. City of Leavenworth*, 15 Kans. 81. "If the city permits a lotowner to occupy the sidewalk, or obstruct the free passage over it, or endanger its safety by excavations beneath it, it does not thereby relieve itself from responsibility. It is, as to third parties, the same as though it had done these things itself." *Jansen v. City of Atchison*, 16 Kans. 385. The city cannot be held liable unless it had notice, actual or implied, of the defect in the sidewalk; nor can the existence of the defect or the negligence of the defendant be inferred from the mere occurrence of the accident. The officers of the city, however, were aware of the unauthorized excavation in the street, which had existed for a long time prior to February, 1888. They knew it had been formerly guarded by a railing, and that this, although insufficient, had been removed. They knew, or should have known, that a loose trapdoor had been placed over this opening. It was the duty of the city to supervise the work of covering the opening, and to cause the use of suitable precautions to prevent accidents. If the officers had exercised a reasonable supervision of the street and walk when the covering was placed there and the railing removed, the perilous character of the place would have been apparent. They would have seen that the ends of the boards on the trapdoor were not nailed to the walk nor to the adjoining building, and that it was liable to be displaced, and occasion such an injury as befell Cowperthwait. They knew, or should have known, that for a period of about two months there was no railing around the trapdoor, or other suitable safeguards for the prevention of accidents. With a knowledge of these facts, and charged as the city authorities are with notice of those which they should know, it cannot be said that the city was without notice. A reasonable supervision on their part would have discovered the defect in time to have prevented the injury. The end of the door which fell rested upon an insecure attachment, the character of which was detailed to the jury. Although some witnesses stated that it was a good job, enough was shown to establish that it was faulty in construction, and, in view of the dangerous excavation beneath, that it was improperly guarded. There was sufficient testimony respecting the negligence of the city officers, including, as it does, the question of notice, to take the case to the jury, and its finding

upon these questions is conclusive. There was a clear omission of duty on the part of the city officers, which makes the city liable for the injury, although they may have had no actual notice of the defect in the attachment upon which the south end of the door rested. Diligent performance of the duty of supervision in the construction of the door would have brought knowledge of the defect. In some cases a want of knowledge is negligence. *Boucher v. City of New Haven*, 40 Conn. 456. No sufficient reasons have been shown for setting aside the verdict, and, therefore, the judgment of the District Court must be affirmed. All the justices concurring.*

OPENINGS IN OR NEAR SIDEWALKS FOR USE OF ABUTTERS—
RIGHTS, DUTIES AND LIABILITIES OF MUNICIPALITY AND
ABUTTERS.

1. Right of abutter to use space beneath sidewalk and make openings into it.—It has long been the established law that an abutter, owning the fee of a street, may make any use of the land which does not interfere with its use for street purposes. *Lewis Em. Dom.* § 589; *Baker v. Shepard*, 24 N. H. 208; *Adams v. Emerson*, 6 Pick. 57; *Barclay v. Howell*, 6 Pet. 498; *Jackson v. Hatheway*, 15 Johns. 447; *Weller v. McCormick*, 52 N. J. L. 470; 19 Atl. Rep. 1101. This would necessarily include the right to excavate beneath the surface, where such excavations would not endanger or interfere with the use of the surface as a highway. The substitution of an artificial surface with artificial support, for a natural surface with natural support, must, necessarily, to some extent, endanger and interfere with the public use in cities and villages, where the entire surface of the street is required for travel. No absolute right to make such interference can, therefore, be implied, since the right of the public to the use of the land for street purposes is paramount. *Lewis Em. Dom.* § 589. The public would seem to have a clear right to the support of the soil beneath the surface, where the use of the surface is necessary, and the right, consequently, to prohibit its excavation altogether, where the use of the entire surface is required. But, however this may be, the public have the right to make all reasonable regulations in regard to such use of the space beneath the surface, and abutting owners must conform to such regulations. 2 Dill. Mun. Corp. §§ 656b, 699, 700.

In the absence of any prohibition or regulation on the subject the authorities support the view that the abutting owner in cities and villages, whether he owns the fee or not, may use the space beneath the sidewalk and make openings into it through the sidewalk, provided there is no unnecessary interruption of the public use and the walk is made reasonably safe and convenient for travel. *Adams v. Fletcher*, 17 R. I. 137; 19 Atl. Rep. 263; *McCarthy v. Syracuse*, 46 N. Y. 194; *Fisher v. Thirkell*, 21 Mich. 1; *Chicago v. Robbins*,

* Reported in 34 Pac. Rep. 795.

2 Black, 418; Robbins v. Chicago, 4 Wall. 657; Clark v. Fry, 8 Ohio St. 858; Jennings v. Van Schaick, 108 N. Y. 530; Papworth v. Milwaukee, 64 Wis. 389; Allen v. Boston, 159 Mass. 324; 34 N. E. Rep. 519; Nelson v. Godfrey, 12 Ill. 20, 23; Babbage v. Powers, 130 N. Y. 281; 29 N. E. Rep. 132; Weller v. McCormick, 52 N. J. L. 470; 2 Dill. Mun. Corp. §§ 656b, 699, 700, 784.

In Fisher v. Thirkell, 21 Mich. 1, it is said: "We are satisfied that at common law the making of such excavations under sidewalks in cities, and the scuttles therein, for such purposes as this was made and used for, were not treated as nuisances in themselves, or in any respect illegal, unless the walk was allowed to remain broken up for an unreasonable length of time, or the work was improperly or unsafely constructed, though it would afterwards become a nuisance if not kept in repair. Judging from the reported cases, the usage or custom of constructing such works in cities seems to have been, in England, for a long period, as general as we know it has been in this country, and though we find many decided cases in the English books for private injuries caused by these structures being out of repair, and indictments for obstructing highways and streets in a great variety of ways, we have been cited to no English cases, and have discovered none, in which such works have been held illegal in themselves when properly and safely made, without any legislative permission, or that of the municipal authorities. Their legality seems, in all the cases, to have been assumed by the courts without any showing of such special authority, or any authority."

In some early New York cases such use of the street is held to be unlawful, in the absence of authority or license from the public authorities, and the abutting owner is held liable for any injury resulting from such use, irrespective of any question of negligence. Congreve v. Smith, 18 N. Y. 79; Dygert v. Schenck, 23 Wend. 446. The law of New York seems yet somewhat unsettled, though it is certain that license may be implied from user for a sufficient length of time. Babbage v. Powers, 130 N. Y. 281; 29 N. E. Rep. 132.

The tendency of the later authorities is to abolish the distinctions based upon the ownership of the fee, so far as the substantial rights of the abutter are concerned. City of Buffalo v. Pratt, 6 Am. R. R. & Corp. Rep. 499, and note; 2 Dill. Mun. Corp. § 656b. In the absence of any regulations on the subject, it is probable that the rights of abutters to use the space beneath sidewalks would be the same, whether they owned the fee of the street or not. In the one case the right would be derived from such ownership, and in the other from an implied license. Judge Dillon, in speaking of the rights of abutters, as affected by this distinction, says: "If they own the fee to the center line of the street, their rights therein are legal in their nature. If they own only the fee to the line of the street, their rights in the street are in the nature of equitable easements in fee, but in extent are substantially the same as where the fee is in them subject to the public use. In either case the abutter is entitled as of right, subject to municipal and public regulation, to make any beneficial use of the soil of the street which is consistent with the prior and paramount rights of the public therein for street purposes proper. The right of the public to use the streets, not only for travel and passage, but

for sewer, gas, water and steam pipes, and the like purposes is, of course, paramount to any proprietary rights of the abutter. The abutter may, as a logical and necessary result, it is believed, whether the fee is in him or in the public, build, *as of right*, underground house vaults in the streets, subject, of course, to the paramount right of the public for street uses proper where the two rights come into competition, and subject also to reasonable legislative, municipal or police regulations as to location, mode of construction and use of such vaults." 2 Dill. Mun. Corp. § 656b.

2. Right of abutters as to excavations, area openings, stairs and the like near or adjacent to sidewalk.—An abutting owner may make such use of his own land as he pleases, provided only that if he makes or permits a use which endangers travel in the street, he must take reasonable precautions to protect the public from harm. "It may be stated as a general rule that the adjoining owner is liable to those properly using the highway for injuries caused by any dangerous excavation made by him so near the highway as to render it unsafe. But if the excavation is not so situated, or left in such condition as to render the highway unsafe to travelers using ordinary care, there is, as a rule at least, no liability on the part of the landowner." Elliott Roads & Streets, 542; and see generally pp. 540-544. Whether any particular use which the abutting owner has made of his property, or condition in which he has put it with respect to the street, is such as to endanger travel and constitute a defect in the street, is a question of fact to be decided in each particular case. See authorities cited in the next section.

3. Duties and liabilities of abutters and municipality in respect to openings in or near sidewalk for benefit of abutting property.—If an abutting owner should make use of the street in a way forbidden by law, or in violation of regulations properly established, he would undoubtedly be liable to any one injured thereby, though not guilty of negligence or wrong otherwise than by disregarding the law. Congreve v. Smith, 18 N. Y. 79; Irvine v. Ward, 51 N. Y. 224; Clifford v. Dam, 81 N. Y. 52; Babbage v. Powers, 130 N. Y. 281; Calder v. Smalley, 66 Iowa, 219. But where openings in or near the sidewalk are constructed by the abutter, under license, express or implied, and in accordance with any conditions imposed by the municipality, neither he nor the municipality will be liable to any person injured thereby, unless they have been guilty of negligence in locating, constructing, guarding, using or repairing the same. "Assuming, however, the rule to be as stated in the Congreve Case, 18 N. Y. 79, where the excavation is made without authority, it is clear that when it is made with the consent of the proper municipal officers, the rule of liability relaxes its severity and rests upon the ordinary principles governing actions of negligence. The person receiving the license is held impliedly to agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard. When conditions, whether express or implied, are annexed to the license, substantial compliance therewith is essential to the protection of the licensee, but consent and compliance relieve the owner from the imputation of trespassing in doing the act consented to, and place him in the position of one liable for negligence only." Babbage v. Powers, 130 N. Y. 281, 286, 287. See, also, Irvine v. Ward, 51 N. Y. 224; Village of Port

Jervis v. First National Bank, 96 N. Y. 550; *Wolf v. Kirkpatrick*, 101 N. Y. 146.

The particular location of an opening in a sidewalk may make it a defect, when it would not be so if located elsewhere, and the municipality is equally liable with the abutting owner for such mislocation. *McClure v. City of Sparta*, 84 Wis. 269; 54 N. W. Rep. 337. In this case a hatchway about three feet square, located in the middle of a walk ten feet wide and directly in the line of travel on a frequented street, though otherwise properly constructed, was held to be a nuisance. The court says: "While it was probably lawful for the city to allow Mr. Baldwin to make an outside hatchway in the sidewalk leading to his cellar, it was the duty of the city to see to it that the same was so located and constructed as not to render the walk unnecessarily unsafe to persons passing along the same when the hatchway should be open. * * * The danger that persons passing along such walk when the hatchway was open would fall into the opening was much greater than it would have been had the hatchway been located close to the store, or even close to the curb, thus leaving seven feet of the walk, extending from one side thereof two feet past the center, unobstructed. This is manifest. It was the duty of the city to direct the location of the hatchway with due regard to the safety of travelers upon the walk. It is obvious that this was not done, but the hatchway was located by Baldwin with sole reference to the convenient transaction of his own business. Under these circumstances, had the court held it conclusively proved that the sidewalk was defective because of the improper location of the hatchway, it would be difficult to say that the ruling was erroneous." See, also, *New York Life Ins. Co. v. Savage*, 7 C. C. A. 260; 58 Fed. Rep. 338; *City Council of Augusta v. Hafels*, 59 Ga. 151; *Chapman v. City of Macon*, 55 Ga. 566, and the principal case.

When vaults are made beneath the sidewalk or openings made in it, it is the duty of the abutter to see to it that the work is so done that the walk will be as safe and convenient for travel, as near as possible, as it was before or would be without such works. *Clifford v. Dam*, 81 N. Y. 52; *Village of Port Jervis v. First National Bank*, 96 N. Y. 550; *Jennings v. Van Schaick*, 108 N. Y. 530; *Irvine v. Ward*, 51 N. Y. 224; *Calder v. Smalley*, 66 Iowa, 219; *Nelson v. Godfrey*, 12 Ill. 20; *Adams v. Fletcher*, 17 R. I. 137; 20 Atl. Rep. 263; *McClure v. City of Sparta*, 84 Wis. 269; 54 N. W. Rep. 337. And as respects the public this is a duty that rests equally upon the municipality and the abutting owner. *Ibid.*

During the process of construction the excavation or opening should be properly guarded, so as to protect the public from injury, and negligence in this respect will subject both the abutter and the municipality to liability for damages resulting from such negligence. *Rowell v. Williams*, 29 Iowa, 210; *Theissen v. Belle Plaine*, 81 Iowa, 118; *Haniford v. City of Kansas*, 103 Mo. 172; 15 S. W. Rep. 753; *Sullivan v. City of Helena*, 10 Mon. 134; 25 Pac. Rep. 94; *Village of Port Jervis v. First National Bank*, 96 N. Y. 550; *Clark v. Fry*, 8 Ohio St. 358; *Hawver v. Whalen*, 49 Ohio St. 69; 29 N. E. Rep. 1049; *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657; *Jones Neg. Mun. Corp.* 383; 2 Dill. Mun. Corp. § 1005; *Elliott Roads & Streets*, 452, 453.

In order to facilitate travel during the progress of construction a temporary bridge may be built over the excavation and raised above the grade of the sidewalk, and such bridge need only be made reasonably safe for travelers under the circumstances. *Nolan v. King*, 97 N. Y. 565. And one using such bridge must use care in proportion to the danger and not merely such care as would be sufficient upon a level sidewalk. *Ibid*.

Area openings in or adjacent to sidewalks to afford light and air to basements should be properly guarded either by a grating over them or railings around them. *Fletcher v. City of Ellsworth*, (Kans.) 37 Pac. Rep. 115; *Bacon v. Boston*, 3 Cush. 174; *Durant v. Palmer*, 29 N. J. L. 544; *Davenport v. Ruckman*, 37 N. Y. 568; *McNerney v. City of Reading*, 150 Penn. St. 611; 25 Atl. Rep. 57; *Neblett v. Nashville*, 12 Heisk. 684.

These cases hold that an unguarded opening in the sidewalk itself or contiguous to it is a nuisance per se, or at least prima facie so. But the contrary is held in *King v. Thompson*, 87 Penn. St. 365, as to an opening in front of a cellar window fifteen inches wide and three feet long. In *Witham v. City of Portland*, 72 Maine, 539, it was held that a depression by a basement window eight and one-half inches wide and six and one-half inches deep was not a defect.

The true rule undoubtedly is that whether a particular opening in a sidewalk constitutes a defect is a question of fact, depending upon its nature, size and location, the width of the walk, character of the street, etc. Evidence that an unguarded opening existed in a walk and that the plaintiff, while in the exercise of due care, stepped into it and was injured, would, in the absence of other evidence, be sufficient to justify a finding that the opening, in its unguarded condition, was a defect. In *Neblett v. City of Nashville*, 12 Heisk. 685, the court says: "We think the true rule may be stated to be, that if an obstruction or excavation be permitted which renders the alley, street or highway unsafe or dangerous to persons or vehicles—whether it lie immediately in or on the alley, street or highway, or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway—it is such a nuisance as renders the corporation liable.

* * * A party bound to keep a highway in repair and open for the passage of the public in a city by night or by day, certainly cannot be held to perform that duty by simply keeping the area of the highway free, while along its edge there is a well or excavation uninclosed, into which the passer by an inadvertent step or an accidental stumble might fall at any time."

Evidence that such openings are usual and customary will not justify a finding that the particular opening is not a defect, though such evidence may be competent for other purposes. In *McNerney v. City of Reading*, 150 Penn. St. 611; 25 Atl. Rep. 57, such evidence was rejected and the ruling approved by the Supreme Court, which said: "It is undoubtedly true that no usage or custom will justify an encroachment on a public highway, or the presence therein of an obstruction which renders it unsafe for the uses to which it is dedicated. An unguarded opening, like that into which the plaintiff fell, is, if located in a much frequented street, a public nuisance, and neither lapse of time nor the existence of like nuisances elsewhere, with the consent of the municipality, will legalize it." On the admission of similar evidence, the

court, in *Bacon v. Boston*, 8 Cush. 174, says: "That the jury should consider all facts bearing upon the manner in which the streets of the city are used, and the purposes of sidewalks, and how far openings in them are obstructions to their proper use, and for this purpose have reference to the nature of such apertures and the extent to which they have heretofore been permitted to exist, might be properly urged; but the fact that similar apertures had existed for a long time, and to a great extent, would not authorize the jury to find that such apertures 'were not actionable obstructions,' or such defects as would charge the city, if an injury was occasioned thereby to a traveler, and if in fact such apertures caused the sidewalks to be in a dangerous state." See, also, *Hall Assn. v. Giles*, 33 N. J. Law, 260, and cases cited below.

As respects stairways leading from or near the sidewalk to the basement some contrariety of opinion exists. In *Beardsley v. City of Hartford*, 50 Conn. 529, it appeared that the sidewalk proper at the place of the accident was eleven feet wide. Between the street line and the building was a space of six and one-half feet, which was flagged like the walk, and was, apparently, a part of it. The stairway was next to the building, parallel with the walk, and extended four and one-half feet from the building. It was protected by railings, except at the entrance. The plaintiff, on a dark and windy night, fell down the stairway. It was held that the city was not negligent in not maintaining a barrier along the lot line to prevent travelers on the street straying upon the adjacent lot and into the opening. The court says: "Is a city bound to maintain a railing in front of the numerous basements and basement steps that line its business streets? Such basements are used in every populous city for business purposes of almost every kind. In a large city like New York the first story of almost every business block is reached by steps, that extend to the line of the street, while on each side of them are steps leading down to offices in the basement. These offices are of great value and rent for large sums, and it is essential for their convenient and profitable use that they be as open as possible to the entry of the public. Indeed, a railing in front of them, with the necessity of opening and shutting a gate as people passed in and out, would greatly impair their value for all the purposes that give them value. The same state of things exists, though in less degree, in a smaller city like Hartford. Along its principal streets such basement steps may be counted by scores. In many of them there is not merely the necessary depression for steps, but the excavation extends along the whole front, giving room for larger windows and wider entrance. Every such depression by the side of the walk, though outside of the limits of the street, renders travel along the sidewalk dangerous; for even if the descent be one of but one or two steps, it would be enough to cause a dangerous fall to one who should inadvertently step off. Indeed, as a person by such a fall would be thrown against the brick or granite sides of the building, such a place would be much more dangerous than a pitfall as deep in a place in the country, where one would fall only upon the soil. It is true that the more populous the city, and hence the more thronged the street, the greater is the number of persons exposed to the danger; but as the city becomes more populous and the streets more thronged, the higher become rents, and the greater necessity for and value of such basement offices and places of business. It may, indeed, be set down as one of the

necessities of city life, that basements along its business, and, therefore, its most thronged streets, should be thus used, and that they should be not only open but inviting to the public. Now, what is the duty of the city with regard to them? There is no practicable way of perfectly protecting the public but by a railing in front of them. Can it be regarded as the duty of a city to maintain such a railing? Are we to apply to the case without qualification the same rule that would be applied to a pithole, like the cellar of a burned building adjoining a sidewalk, where a railing would cause no inconvenience to the owner of the property? * * * People collect in cities in large part for purposes of traffic, and to these purposes the central and most crowded streets of a city are almost wholly devoted. Must not the necessities of this business furnish the law that shall determine the action of the city in the matter of barring out the public, for the sake of the safety of travelers, from these places below the level of the sidewalk that the business of the city absolutely requires should be kept easily accessible? There are special dangers all along a city street for an unwary foot passenger that do not exist in country towns. * * * They are necessary features of a city, and the peril a necessary incident of city life. The open basement descents are as necessary to the business of a city as the open and unprotected wharves of a seaport are to its commerce. * * * If the erection of a barrier in front of such an entrance is what the city has no right to do, or if, having the right, it is what it cannot reasonably be expected to do, then there is no negligence in the omission to do it."

Fitzgerald v. City of Berlin, 51 Wis. 81, is a precisely similar case, decided two years earlier and in the same way. The court expressed views similar to these quoted from the Connecticut case. So in *Richardson v. City of Boston*, 156 Mass. 145; 30 N. E. Rep. 478, where the stairs descended from the sidewalk, and at right angles to it, to an arched passageway leading to the rear of the building. "It is a matter of general observation," says the court, "that entrances and archways similar to this are of common occurrence in cities. Nothing shows that there was anything improper or unusual about this one, or that it exposed those passing along the highway to any unusual hazard. We do not think that reasonable security to the public required that it should be fenced or railed, and that the owners and their tenants of this and similar blocks with similar entrances should be subjected to the annoyance and inconvenience which would result if cities and towns were obliged to put up barriers."

In *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260, the plaintiff fell down a stairway, which was parallel with the sidewalk and guarded except at the entrance. It does not appear from the report whether it was within the limits of the street or on private property. The suit was against the owner, and it was held liable on the basis of the open entrance being a public nuisance. It was held that evidence that such openings were common was properly excluded. On this point the court says: "As no length of time will legalize a public nuisance, so the existence of other unlawful erections of the same kind, however numerous, will not remove the taint of illegality from any one or all of them." "The existence of similar apertures in other parts of the city, in great numbers, and for a long time, is not evidence from which a jury may infer that such apertures are not actionable nuisances."

In *City of Franklin v. Harter*, 127 Ind. 446; 26 N. E. Rep. 882, and *Lichtenberger v. Town of Meriden*, (Iowa), 58 N. W. Rep. 1058, it was held to be a question of fact for the jury, whether stairs descending at right angles to the sidewalk and occupying a portion of the walk, constituted a defect, the same being open at the entrance but protected by barriers on either side.

If the covers or their supports of vaults beneath the walk, or the barriers about stairs or area openings, become out of repair and dangerous, the municipality and the abutting owner or occupier, as the case may be, will be liable for injuries resulting from such want of repair. *Gridley v. City of Bloomington*, 68 Ill. 47; *City of Chicago v. Babcock*, 143 Ill. 358; 32 N. E. Rep. 271; *Owings v. Jones*, 9 Md. 108; *City of Lowell v. Spaulding*, 4 Cush. 277; *Fisher v. Thirkell*, 21 Mich. 1; *Grove v. City of Kansas*, 75 Mo. 672; *Davenport v. Ruckman*, 37 N. Y. 568; *McGuire v. Spencer*, 91 N. Y. 303; *Wolf v. Kirkpatrick*, 101 N. Y. 146; *Babbage v. Powers*, 130 N. Y. 281; 34 N. E. Rep. 132; *Bears v. Ambler*, 9 Penn. St. 193; *New York Life Ins. Co. v. Savage*, 7 C. C. A. 260; 58 Fed. Rep. 338; *City of Lincoln v. Power*, 151 U. S. 436; 14 Sup. Ct. Rep. 387. The duty of the municipality in respect to such works, is the same as its duty in respect to sidewalks generally, to exercise reasonable care that they do not get out of repair and unsafe, and this involves the duty of inspecting such works at proper intervals and with a reasonable degree of efficiency.

As the municipality may lawfully permit the use of the space beneath the sidewalk by the abutter, with openings into it through the sidewalk, provided the openings are covered and the sidewalk made as safe and convenient as it reasonably can be, it follows that it is not liable for the act of the owner or occupier in temporarily and negligently leaving such openings uncovered. But it has been held that if the occupier has been habitually negligent in this respect for a considerable length of time, the city will be liable for permitting such practice to continue after actual or constructive notice thereof. *Chapman v. City of Macon*, 55 Ga. 566; *City Council of Augusta v. Hafers*, 59 Ga. 151.

4. Liability as between landlord and tenant.—The owner or landlord remains liable for any improper, insufficient or defective construction of openings in or near the sidewalk, whereby a nuisance or defect is created in the street, notwithstanding the fact that the premises are in the possession of a tenant. *Colder v. Smalley*, 66 Iowa, 219; *Owings v. Jones*, 9 Md. 108; *Durant v. Palmer*, 29 N. J. Law, 544; *Temperance Hall Assn. v. Giles*, 33 N. J. Law, 260. So, if the works, though properly constructed originally, were out of repair when let. *Gridley v. City of Bloomington*, 68 Ill. 47; *Davenport v. Ruckman*, 37 N. Y. 568; *Irvine v. Wood*, 51 N. Y. 224. But if the works are properly constructed and are in good repair when let, then the tenant and not the owner is liable if they become out of repair or defective during the term, or are so used as to create a nuisance. *Gridley v. City of Bloomington*, 68 Ill. 47; *City of Lowell v. Spaulding*, 4 Cush. 277; *Fisher v. Thirkell*, 21 Mich. 1; *Davenport v. Ruckman*, 37 N. Y. 568; *Irvine v. Wood*, 51 N. Y. 224; *Wolf v. Kirkpatrick*, 101 N. Y. 146; *Jennings v. Van Schaick*, 108 N. Y. 530; *Babbage v. Powers*, 130 N. Y. 281; 34 N. E. Rep. 132; *Bears v. Ambler*, 9 Penn. St. 193; *Adams v. Fletcher*, 17 R. I. 137; 20 Atl. Rep. 263. The owner

out of possession is presumably not bound to repair. *Rich v. Basterfield*, 4 M., G. & S. 788; *Russell v. Shenton*, 3 Ad. & E. (N. S.) 449; *Bishop v. Bedford Charity*, 1 El. & El. 697. If, however, the owner has agreed with his tenant to keep the premises in repair, he will be liable for a want of repair in the respects mentioned. *Gridley v. Bloomington*, 68 Ill. 47; *City of Lowell v. Spaulding*, 4 Cush. 277; *Davenport v. Ruckman*, 37 N. Y. 568. But, as said by the court in *Bears v. Ambler*, 9 Penn. St. 198, "it is the duty of the tenant or occupier in the first instance to keep the ways in such order as not to endanger others, whatever may be his agreement with the landlord or owner of the premises."

In case of office buildings, apartment buildings and the like, where the offices or apartments are occupied by tenants, but the owner retains control of the halls, passageways and exterior of the building, he will be bound to keep the works in question in proper repair, and will, of course, be liable for any neglect of duty in that regard. *Kirby v. Boylston Market Assn.*, 14 Gray, 249; *Jennings v. Van Schaick*, 108 N. Y. 530. As to who will be responsible for the negligence of the janitor of such a building, who is employed by both the tenants and the landlord, see *Jennings v. Van Schaick*, 108 N. Y. 530.

4. Liability over.—Where a municipal corporation has been compelled to pay damages sustained by reason of a defect in a sidewalk, which defect has been created or negligently permitted to exist by the owner or occupier of the abutting property, it may indemnify itself by an action over against such owner or occupant. *Village of Port Jervis v. First National Bank*, 96 N. Y. 550; *Inhabitants of Westfield v. Mayo*, 122 Mass. 100; *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657; *Gridley v. City of Bloomington*, 68 Ill. 47. The first two cases cited are especially elaborate on the subject, including the consequences of notice and of failure to give notice of the pendency of the first action. See, also, 2 Dill. Mun. Corp. § 1035. In such action over it is, of course, necessary to establish the liability of the defendant for the existing of the defect causing the injury. *City of Lowell v. Glidden*, 159 Mass. 317; 34 N. E. Rep. 459. This case covers another point in such suits in the following language: "It must be conceded in favor of the plaintiff that, if a person has created a nuisance in a public street, and a city is, in consequence thereof, obliged to pay damages to a traveler on the street, the fact that the city is in fault in not removing the nuisance does not make it in pari delictu with the creator of the nuisance, and prevent recovery against him. *Lowell v. Railroad Co.*, 23 Pick. 24; *Lowell v. Short*, 4 Cush. 275; *West Boylston v. Mason*, 102 Mass. 341; *Swansey v. Chace*, 16 Gray, 303; *Woburn v. Railroad Co.*, 109 Mass. 283; *Campbell v. Somerville*, 114 Mass. 334; *Westfield v. Mayo*, 122 Mass. 100."

5. Contributory negligence of plaintiff.—Most of the cases cited in this note discuss the question of contributory negligence. The question in most cases is necessarily one for the jury. It is held that the mere fact that the plaintiff, walking along the sidewalk in the daytime, stepped into an open area way and was injured, does not justify a direction to the jury, in an action for the injury, to find for the defendant on account of the plaintiff's contributory negligence. *City of Chicago v. Babcock*, 148 Ill. 358; 32 N. E. Rep. 271. So, where the plaintiff was standing upon the sidewalk talking to another,

and stepped back to make room for a passer-by, and in doing so stepped into an open cellarway and was injured, it was held that the question of his contributory negligence was for the jury, though he knew of the cellarway and was perfectly familiar with the locality, himself having a store opposite. *Lichtenberger v. Town of Meriden*, (Iowa) 58 N. W. Rep. 1058. See, also, *Fletcher v. City of Elsworth*, (Kans.) 37 Pac. Rep. 115; *McClure v. City of Sparta*, 84 Wis. 269; *City of Lincoln v. Power*, 151 U. S. 436; 14 Sup. Ct. Rep. 387.

GRISWOLD ET AL. v. ILLINOIS CENT. R. Co.

(Supreme Court of Iowa, February 3, 1894.)

1. RAILROAD COMPANIES. VALIDITY OF CONTRACT EXEMPTING COMPANY FROM LIABILITY FOR NEGLIGENTLY SETTING FIRE TO ELEVATOR PERMITTED TO BE PLACED ON ITS RIGHT OF WAY. Code of Iowa, section 1289, making a railway company liable for damages from fire, does not give the public such an interest in the company's exercise of care with respect to buildings which it has permitted a person to erect on its right of way grounds as to render void, as against public policy, a contract exempting the company from liability for damages by fire negligently communicated to the buildings by the company's engines.

2. A contract whereby a railway company gives a person the right to erect an elevator and coal sheds on its right of way in consideration of his maintaining them, making shipments over the company's road, and exempting it from liability for damage by fire negligently communicated to the buildings by the company's engines, is not made by the company in its capacity as common carrier, and is not governed by the Code, section 1308, providing that a common carrier cannot exempt itself from liability as such carrier by contract.

3. Though the parties to the contract contemplated a place for dealing with the public, in the management of which the public might be interested, neither that interest, nor the agreement of the person permitted to erect the elevator and coal sheds on the railway's right of way grounds that he would transact business so that neither the public nor the railway company should be prejudiced thereby, gives the public any interest as to who shall bear the hazard of the loss of the building from fire, so as to make void, as against public policy, the provision exempting the railway company from liability in case the buildings are damaged by fire negligently communicated thereto by the company's engines.

ACTION to recover damages for the loss of an elevator by fire, alleged to have been caused by negligence on the part of defendant. A demurrer to the answer was overruled. The

plaintiffs electing to stand on their demurrer, judgment was rendered against them for costs, and they appeal.

R. W. Barger and *E. E. Hasner*, for appellants. *W. J. Knight*, for appellee.

GIVEN, J. A rehearing was granted in this case, and it is again submitted with further arguments. The facts disclosed by the pleadings, which are material to be considered, are sufficiently stated in the former opinion (53 N. W. Rep. 295), and are as follows: "On the 30th day of April, 1890, the plaintiff Griswold owned a two and one-half story elevator building, warehouse and corncrib attached, together with engine and boiler connections and feed mill therein, all of which were situated on the depot grounds of defendant immediately north of its track, in the village of Winthrop. In the morning of the day named, the property described was totally destroyed by fire, which was kindled by sparks and cinders from a locomotive engine of defendant while passing on its track. The sparks and cinders escaped from the engine in consequence of defects in its construction and appliances, and in consequence of the negligent manner in which it was operated. The property destroyed was of the value of \$6,000, and was, at the time, insured by the plaintiffs the Iowa State Insurance Company, the Commercial Union Assurance Company, Limited, the St. Paul German Insurance Company, and the Farmers' Fire Insurance Company in the sum of \$1,000 each, or for the aggregate amount of \$4,000. After the property was destroyed, each insurance company paid the amount of loss for which it was responsible, and claiming that by reason of such payments they became subrogated to the rights of Griswold to the extent of the amounts so paid, they join him in demanding judgment against defendant for the value of the property destroyed. Griswold occupied the premises on which the property stood by virtue of a lease to him from defendant, which contained the following provisions: 'And the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the said lessor, as rent for said premises, the sum of one dollar, to be paid at the time and in the manner following, to

wit, on the delivery of this lease ; and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good substantial elevator, coal sheds and lumber yard on the above-described premises ; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises. And the said lessee hereby agrees to ship all grain, coal and lumber he can control by the Illinois Central railroad. And the said lessee further covenants and agrees with the said lessor that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal and lumber building so erected as aforesaid.' The defendant claims that plaintiffs are not entitled to recover, for the reason that Griswold undertook, by the terms of the lease, to protect and save it harmless from such losses as that in question. The ground of the demurrer is as follows : 'The petition and answer show that the action is commenced by the owner and insurer of an elevator built upon defendant's land alongside of its tracks, for the purpose of handling grain, and that said elevator was burned through the negligence of defendant, its agents and employees. The plaintiffs, therefore, say it is against public policy, and contrary to the statutes of Iowa, for the defendant to attempt to restrict by contract its liability for the negligence of its agents, employees and servants ; and that said defense, so far as it is based upon exemptions from liability by reason of this contract of lease, is not good, as such contract of exemption is void.' No special claims are made in behalf of the insurance companies ; therefore, their interests and that of Griswold, for the purposes of this appeal, will be treated as governed by the same rules."

1. It will be seen, from the statement of the case, that the controlling question is whether that clause in the lease whereby plaintiff Griswold agrees to protect and save harmless the defendant from all liability for damages by fire negligently com-

municated to the property on the leased premises in the operation of the railroad is void, as against public policy. The right to so contract as to fire accidentally communicated is not questioned, but only the right to so contract as to fire negligently communicated. Public policy is variable—the very reverse of that which is the policy of the public at one time may become public policy at another; hence, no fixed rule can be given by which to determine what is public policy. The authorities all agree that a contract is not void, as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society. Public policy has been aptly described as “an unruly horse, and, when once you get astride, you never know where it will carry you.” It was said by Wilmot, Ch. J.: “It is the duty of all courts to keep their eyes steadily upon the interests of the public, even in the determination of community justice, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance in *foro civili*.” Other courts have said: “We may take it as well settled that in the law of contracts the first purpose of the courts is to look to the welfare of the public, and, if the enforcement of the agreement would be inimical to its interest no relief could be granted to the party injured, and even though it might result beneficially to the party who made and violated the agreement. The common law will not permit individuals to oblige themselves by a contract either to do, or not to do, anything, when the thing to be done or omitted is in any degree clearly injurious to the public.” Again, it is said: “It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract.” *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1; 3 Am. & Eng. Ency. of Law, p. 875, n. 3; *Boardman v. Thompson*, 25 Iowa, 501. Aided by these definitions and cautions, we proceed

again to inquire whether the clause of the agreement in question, if carried into effect, would be injurious to any interest of the public, or, in other words, whether the public has any interest in this provision of the contract. The conclusion of the former opinion is "that the provision, if effectual, would cause the defendant to disregard and neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law." This conclusion rests, in part at least, upon holding that sections 1289 and 1308 of the Code are applicable to the question under consideration, and that the defendant owed it as a duty to the public to operate its road with care with respect to plaintiff's property. The discussion on rehearing leads us to inquire whether, under the law and facts, it is correct to say that the defendant owed any duty to the public with respect to the plaintiff's property. The former opinion holds correctly that the liability of railroad corporations, under section 1289, for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exercise care is towards the public; but the question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of the property of the plaintiff. The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and, hence, the provision of section 1289 making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not on his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting

the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. They knew that the defendant corporation could only act through its officers, agents and employees, and that these might be negligent in the performance of their duties. The plaintiff had an insurable interest, and could, as he did, protect himself, in part at least, against loss by either accident or negligence. The defendant had no insurable interest, and could only protect itself from the hazard by refusing consent, or by contracting for indemnity, as it did. Plaintiff Griswold contracted with his coplaintiffs, the insurance companies, for indemnity against loss by fire, whether caused by accident or negligence. The fire occurred through neglect, and the insurance companies, as they were bound to do, paid the insurance. Those contracts, like this, were for indemnity against liability by fire, whether caused by accident or negligence. Many losses by fire occur through the negligence of the insured or his family, and recovery is had unless the negligence was willful. While these policies are not before us, we may assume, we think, that under them the plaintiff Griswold would have been entitled to recover, even though the loss had occurred through his own negligence, unless it was willful. The public had no interest in these contracts of insurance between the plaintiffs; nor were they against public policy, because the companies agreed to indemnify the assured against loss caused by his own negligence. This is not a question whether, under section 1289, the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was. The fact that the defendant acquired this right

of way in the exercise of the right of eminent domain did not preclude it from granting or withholding permission to the plaintiff to build thereon, nor the parties from contracting as to which should bear the hazard incident to the location.

2. It is contended that the defendant entered into this contract in its capacity as a common carrier, and, therefore, we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property cannot exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses or elsewhere apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable. *Johnson's Admx. v. Railroad Co.*, 86 Va. 975; 11 S. E. Rep. 829, and other cases involving contracts of exemption from liability for causing injuries to, or death of, persons, are not applicable. The public has an interest in the life and safety of every human being, and every such contract is clearly injurious to public interest, but not always so as to property.

3. In the lease the plaintiff Griswold agrees "that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal and lumber building so erected as aforesaid." While it is evident the parties contemplated a place for dealing with the public, in the maintenance and management of which the public might be interested, neither that interest nor Mr. Griswold's agreement gave the public any interest as to who should bear the hazard of the loss of the buildings by fire. The plaintiff indemnified himself against the loss, in part at least, by insurance, and the insurance companies have paid him, as they

were bound to. Surely, public policy does not demand that the defendant shall now reimburse these insurance companies for the payments they were bound to make by their own contract, and which the defendant has never promised to repay. As to the claim of the plaintiff Griswold to recover the excess of the loss over the amount of insurance, public policy answers, "You must stand by your contract." After a careful review of the case, we reach the conclusion that the public had no interest in the clause of the contract in question, that its enforcement works no injury to any interest of the public, and that the judgment of the District Court should be affirmed.

ROBINSON, J. (dissenting). I cannot assent to the conclusions of the foregoing opinion that the agreement in question was effectual to relieve the defendant of liability for negligently setting fire to and destroying the property of the plaintiff. Something has been said on rehearing in regard to the liability of the defendant to the insurance companies and their right to recover; but as no question in regard to such liability and right of recovery, as distinguished from the liability of defendant to Griswold for the loss he sustained, for which he has not been compensated, is presented by the pleadings, or was argued on the first submission of the cause, it should not, as it seems to me, be given weight now. It is well settled that, in a civil case, a party cannot, on rehearing, make a case different from that presented on the original submission. *McDermott v. Railway Co.*, (Iowa) 52 N. W. Rep. 185, and cases therein cited. It follows that the only questions which we should now consider are those involved in determining the character and effect of the provisions of the contract in question, and the right of Griswold to recover, without regard to the interests of the insurance companies. On the rehearing we have been favored with elaborate arguments by representatives of several of the leading railway corporations doing business in the state, and in explanation it is said that the questions involved are of interest to all railway companies in the state, and that the former opinion, if adhered to, will seriously affect their management and business. It is probably fair to presume that leases with provisions similar to the one in controversy are now, or soon will be, in general use in the state, and that the questions involved are of interest to the large

number of persons who are now, or shall hereafter be, concerned in buildings and property located on land owned by railway corporations by virtue of leases from the corporations. The importance of the questions to the railways and to people doing business with them is apparent. It does not seem to me that the authorities cited in the opinion of the majority justify the conclusions they reach. Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. * * *". It was said in *West v. Railway Co.*, 77 Iowa, 654; 35 N. W. Rep. 479, and 42 N. W. Rep. 512, that this statute imposes an absolute liability upon railway corporations without regard to the contributory negligence of the person injured, for damages resulting from fires set out or caused by negligently operating their railways. The facts admitted in this case show that the fire in question was caused by defendant in operating its railway, and that the fire was the result of negligence on its part. Whether a railway company may limit its liability for a fire which it causes without fault on its part is a question not involved in this case; but we are required to determine whether a railway company may, by a contract entered into before the act, limit its liability for a fire which is caused by negligence on its part in operating its railway. Section 1308 of the Code provides, in effect, that a common carrier or carrier of passengers cannot exempt itself from liability, as such carrier, by contract. Although there is some conflict in the authorities, yet it is the general rule, in the absence of statutory regulations, that railway companies cannot restrict their liability for negligence in transporting passengers or freight by contracts made in advance of the carriage; and the same is true in regard to the power of telegraph companies to limit their liability for negligence in transmitting dispatches. It is said in *Cooley on Torts* (p. 687), with reference to agreements of that kind, that "the cases of carriers and telegraph companies have been specially mentioned because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a

party undertakes to put another at the mercy of his own faulty conduct." In *Johnson's Admx. v. Railroad Co.*, 86 Va. 975; 11 S. E. Rep. 829, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarrymen, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to, or death of, any of the members of the said firm, or of any of its agents or employees, sustained from said work, should such death or injury occur from any cause whatever." The court, in commenting on this provision of the agreement, said: "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against the public policy are void. Nothing is better settled — certainly in this court — than that a common carrier cannot, by contract, exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire. This is so, independently of section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally."

Railway corporations are quasi public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty and cannot be enforced. *Railroad Co. v. Ryan*, 11 Kans. 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy. *Thomas v. Railroad Co.*, 101 U. S. 71. Among the obligations

imposed upon a railway corporation is that of using reasonable diligence in furnishing its road with safe equipments, including locomotive engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which tends to lessen the diligence and care with which it furnishes and operates its road is, to that extent, against public policy. The contract entered into between Griswold and defendant was not for carriage, and primarily it was for the benefit of the parties to it, and not in the interest of the public. But it is clear that its purpose on the part of defendant was to benefit and promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement. Elevators, coal sheds and lumber yards are important aids to a railway engaged in carrying grain, coal and lumber, in securing and transacting that branch of its business; and the promise of Griswold to maintain and use them, and to ship all grain, coal and lumber he could control over defendant's road, and the prospect for business which the existence and use of the improvements named held out to defendant, were no doubt important and controlling considerations which induced it to execute the lease. Those improvements were not only of value to the defendant, but they were important to all who bought or sold or stored commodities which were received in them. In other words, the lease was a means to promote the ends for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided, to the extent to which it patronized them. Its interest may not have been a distinct entity, capable of enforcement at the suit of any citizen, but it was one which the law recognizes, and which it will, in a suitable case, protect. The lease itself fully recognizes an interest of the public in its subject-matter. It provides that the lessee "shall transact the business for which said buildings are erected and designed, at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal and lumber building so erected as aforesaid." It is true that a contract is not void, as against the public policy, unless it is injurious to the interests of the public,

or tends to have that effect, or contravenes some established interest of society. But, when a contract belongs to one of those classes, it will be declared void, although in a particular instance no injury to the public may result. 5 Lawson Rights, Rem. & Pr. 2392. "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibited by a statute, termed a 'contract against public policy' (or sound policy), is likewise void." Bish. Cont. § 473. To justify the conclusion that the provision under consideration is void, it is only necessary to find that the provision, if effectual, would cause, or tend to cause, the defendant to disregard or neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law. That such would be the effect of the provision, if sustained, does not appear to me to be doubtful. It was not intended merely to require Griswold to bear the loss which should result from the hazards to which his property should be exposed by operating the railway with reasonable prudence and care, but it was intended to exempt the defendant from all liability for damages from fire which should be caused in operating its railway without regard to acts of negligence, or lack of precaution and care on its part, which should contribute to the loss. The agreement sought to exempt the defendant from liability for negligence, whatever its nature, which should be involved in the management of its railway. Such negligence might be manifested in many ways — as, in the use of insufficient or defective machinery, in the employment of careless or incompetent trainmen, or in having an insufficient number of trainmen — and was necessarily of a kind to affect the business of defendant as a common carrier. The tendency of the agreement was to make the defendant, in keeping its locomotive engines in good order, in adopting improvements to prevent the escape of fire, and in selecting its employees, less diligent than it would otherwise have been, and thus to expose, not only the property of Griswold, but all other property of a combustible kind located upon its grounds, to dangers which reasonable care on its part would have prevented. The tendency of the agreement is more clearly seen when the probable aggregate effect of such agreements, entered into between defendant and all the tenants on its right of way and depot grounds in the state, is considered. To keep in good order the machinery and

appurtenances of a railway, and to operate it in the manner which reasonable prudence demands, involve the expenditure of large sums of money, and the constant exercise of skill and care by railroad employees. Whatever tends to lessen the degree of care used in operating a railway is to that extent inimical to public interest, and contrary to public policy. Combustible property on the depot and right of way grounds of a railway company is of necessity more exposed to danger from fire caused by operating the railway than property outside of their limits; and if it can, by agreement, protect itself against liability for negligently destroying the property on its grounds, the common experience of mankind, as applied to other matters, teaches us that the natural effect of such an agreement is to lessen the care and diligence the railway company will use to prevent such negligence and the consequent loss. It follows that each tenant is interested in the agreement of every other tenant on the same line or division of railway, and that the people who store property in the buildings of such tenants, or who are concerned in grain, coal, lumber and other articles which are received in, or delivered from, such buildings, are also interested in the agreements.

It does not seem to me that the law which governs ordinary contracts of insurance is applicable to this case. In such contracts the property owner is never, in terms, insured against the consequences of his own negligence. On the contrary, great care is taken to guard against and prevent negligence on his part. Insurance to the full value of the property is not given, and all inducement to negligence on his part is withheld. If loss result from his negligence, as a rule, he and the insurance company, only, are affected, his negligence not being of a character to affect the public. I am not aware that an agreement to insure a person against the consequences of his own negligence, the natural and probable effect of which would be to encourage such negligence to the danger and prejudice of others, is sustained by the courts. It is true that the public has no interest in the damages in controversy in this action, but it had an interest in the agreement in question so far as it tended to induce negligence on the part of defendant in operating its railway; and as negligence of that kind was the natural and probable effect of the agreement, and as the agreement is not separable, it would seem to follow

that it should be held void. This conclusion is not only in entire harmony with the authorities cited in the opinion of the majority, but, as it seems to me, is required by them, as well as by the authorities cited in this dissent.

Whether the defendant owed to the public any duty in regard to its own buildings, whether the defendant had insurable interest in the property of Griswold which was destroyed, and whether the insurance companies are entitled to recover the amounts they have paid to Griswold are questions which do not appear to me to be so presented as to make it proper for us to determine them on this appeal, and in regard to them I express no opinion. Kinne, J., concurs in the dissenting opinion.*

Validity of contracts which exonerate a person from liability for negligence. This is a question which appears to have arisen principally in three classes of cases; in contracts between carriers and shippers or passengers, between telegraph companies and their patrons and between master and servant. The weight of authority is decidedly in favor of the proposition that a carrier cannot contract for exemption from negligence, and that all such contracts are against public policy and void. *Little Rock, etc., R. Co. v. Cravens*, 7 Am. R. R. & Corp. Rep. 270, and note; *Alair v. Northern Pac. R. Co.*, 8 Am. R. R. & Corp. Rep. 445, and note; *Abrams v. Milwaukee, etc., R. Co.*, ante, p. 354. The validity of such contracts in case of gratuitous passengers is considered in *Muldoon v. Seattle City Ry. Co.*, post, and note, and in *Quinby v. Boston & Me. R. Co.*, 1 Am. R. R. & Corp. Rep. 113, and note.

As to contracts by which telegraph companies stipulate for exemption from liability for negligence in sending or delivering messages, the authorities are more evenly divided. The authorities on the subject are collected in the note to *Primose v. Western Union Tel. Co.*, post.

As to contracts by which the master attempts to secure exemption from liability to his servant for injuries occasioned by the former's negligence, the weight of authority is decidedly against their validity. The question appears to have first arisen in Georgia in the case of *Western & Atlantic R. Co. v. Bishop*, 50 Ga. 465, decided in 1872. The suit was for injuries received by the plaintiff in attempting to couple cars. The contract of employment was in writing, and in it the plaintiff agreed that he would "take upon himself all risks connected with or incident to his position on the road," and that he would "in no case hold the company liable for any injury or damage he may sustain in his person or otherwise, by what are called accidents or collisions, on the trains or road, or which may result from the negligence, carelessness or misconduct of himself or any other employee or person connected with said road, or in the service of said company." The court sustained the validity of the contract, and in its opinion said: "We know of no law which limits the right

* Reported in 57 N. W. Rep. 843.

of employer and employee to contract for themselves as to the relative rights and duties of each to the other, provided the contract be not forbidden by positive law, or be contrary to public policy. They are both free citizens. Labor is property, and the laborer has, and ought to have, the same right to contract in reference to it as other freemen have in reference to their property. Generally, the duties cast by law upon employer and employee are only implications of law, in the absence of stipulations by the parties. If one enter into the employment of another, and there be no stipulations as to wages, hours of labor, industry, etc., the law implies an obligation upon the employer to pay reasonable or customary wages, and upon the employee reasonable industry, and upon both reasonable hours of labor. It also implies various other duties and obligations; but, obviously, these are all only implications, in the absence of any agreement between the parties, and it would be a dangerous interference with private rights to undertake to fix by law the terms upon which employers and employees shall contract. For myself, I do not hesitate to say that I know of no right more precious, and one which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same lawgiver which claims to make a contract for them upon one point may claim to do so upon others, and thus, step by step, they cease to be free men."

The court, however, held that the contract would not be valid as against the criminal negligence of the company. This case was followed in *Western & Atlantic R. Co. v. Strong*, 52 Ga. 461 (1874); *Hendricks v. Western & Atlantic R. Co.*, 52 Ga. 467 (1874); *Galloway v. Western & Atlantic R. Co.*, 57 Ga. 512 (1876). In the very recent case of *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 318; 15 S. E. Rep. 322 (1892), in which no opinion was rendered, the court, in a syllabus prepared by itself, says: "The rule that, as between employer and employee, the latter in the contract of hiring may assume all risks appertaining to the service, save such as arise from criminal negligence, was declared in the case of *Railroad Company v. Bishop*, 50 Ga. 465, decided by the full bench in 1872. This case was followed and applied in *Railroad Co. v. Strong*, and *Hendricks v. Railroad Co.*, 52 Ga. 461, 467. It was also recognized as authority in 1876, in *Galloway v. Railroad Co.*, 57 Ga. 512, and again in 1883, in *Cook v. Same*, 72 Ga. 48. The acquiescence of the legislature in the principle for so long a time is strong, if not decisive, evidence of the public policy of this state touching the question, more especially as legislative attention must have been called to the subject when the act of 1876, Code, § 4586 (b), was passed, which deals with criminal negligence of railroad employees, but forbears to interfere with the prior law as to other employees, or to employees generally. Under these circumstances, this court, on a review of the above-mentioned cases, declines to overrule them, but, on the contrary, affirms the same in so far as they are unmodified by the statute just cited touching railroad employees." This manner of affirming the rule on the ground of legislative acquiescence and of stare decisis, suggests that the court may have deemed it wrong upon principle.

In *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357 (1882), it was held that the contract of an employee in a mine, waiving the rights and benefits secured to him by the Employers' Liability Act of 1880 (43 & 44 Vict. chap. 42), was valid and binding both upon the employee and his representatives. The employee was killed by reason of the defective apparatus, and the defect existed through the negligence of an inspector who was a co-employee of the deceased. Field, J., says: "It is at least doubtful whether, when a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy. * * * It is legitimate to see what would be the consequences if the construction contended for by plaintiff's counsel prevailed, because, if injustice would result, it is unlikely the legislature intended that construction. I think a great injustice would result, because the workman might obtain the benefit of the contract for years in the form of higher wages to cover the risk of injury, and then claim full additional compensation when he was injured. The strongest argument suggested in favor of the contention for the plaintiff is the desire of the legislature to protect workmen. Protection has been afforded them against late hours of work, unfenced machinery, the employment of children in manufactories, and in other instances. If it could be shown in the present case that large classes of workmen would be deprived of the protection which the legislature intended to give them by a decision that they could contract themselves out of the provisions of the Employers' Liability Act, a strong argument against that construction would be afforded. But that cannot be shown. I am of opinion, therefore, that this rule should be made absolute to enter judgment for the defendant."

The Georgia cases are the only ones in this country sustaining the validity of contracts exempting the master from liability to his servant for negligence. In an early case upon the subject, Judge Gresham put the matter very forcibly as follows: "When the defendant's negligence in supplying his employees with unsafe machinery has caused the death of the latter, the law will not allow the defendant to say, as in effect he does say in this answer, 'It is true that my machinery was defective and unsafe, and my negligence caused the death of my employee, but I am not liable to those who have suffered from the loss of his life, because I had a contract with my employee which secured to me the right to supply him with defective and unsafe machinery, and to be negligent.' Such a contract is void as against public policy." *Roesner v. Hermann*, 8 Fed. Rep. 782.

Similar contracts have been held to be invalid in the following cases: *Little Rock, etc., R. Co. v. Eubanks*, 48 Ark. 466 (1886); *Railway Co. v. Spangler*, 44 Ohio St. 471; 8 N. E. Rep. 467 (1886); *Johnson's Admx. v. Richmond & D. R. Co.*, 86 Va. 975; 11 S. E. Rep. 829 (1890); *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514; 8 South. Rep. 776 (1891); *Louisville & N. R. Co. v. Orr*, 91 Ala. 548; 8 South. Rep. 360 (1890).

In the first of these cases it is said: "Our Constitution and laws provide that all railroads operated in this state shall be responsible for all damages to persons and property done by the running of trains. Const. 1874, art. 17, § 12; Mansf. Dig. § 5587. This means that they shall be responsible only in cases where they have been guilty of some negligence. And it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy. The law requires a master to furnish his servant with a reasonably safe place to work in, and with sound and suitable tools and appliances to do his work. If he can supply an unsafe machine, or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutary rule. In the English case above cited (*Griffith v. Earl of Dudley*, 9 Q. B. D. 357), it is said this is not against public policy, because it does not affect all society, but only the interest of the employed. But surely the state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community. And it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railroad company and every owner of a factory, mill or mine would make it a condition, precedent to the employment of labor, that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils and occupations which are hazardous, even when well managed. And the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity."

In *Railway Co. v. Spangler*, 44 Ohio St. 471; 8 N. E. Rep. 467, it is said that the master's liability to his servant for negligence "is not created for the protection of the employees simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements."

In *Kansas Pac. R. v. Peavey*, 29 Kans. 169 (1883), it is held that a contract by an employee, waiving the benefit of a statute making the master liable to the servant for an injury resulting from the negligence of a fellow-servant, is void as against public policy. The court says: "The state has such an interest in the lives and limbs of its citizens that it has power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is, that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good if there be no

express provision in the statute peremptorily declaring all contracts in violation of its provisions void, in regard to statutes intended generally to protect the public interests or to vindicate public morals." A similar decision was made in *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514; 8 South. Rep. 776 (1891). See, also, *Simpson v. New York Rubber Co.*, 30 N. Y. Supp. 339.

Contracts by which the master attempts to relieve himself from liability to his employees for negligence are generally condemned by the text writers. 2 Thomp. Neg. 1025; *Greenhood Pub. Pol.* 528; *Cooley Torts*, 829; 3 *Wood Ry.* 1765. See, also, *Memphis, etc., R. Co. v. Jones*, 2 Head, 517; *Purdy v. Rome, W. & O. R. Co.*, 125 N. Y. 209, 214; 26 N. E. Rep. 255.

Judge Cooley in his work upon Torts, after referring to the cases of carriers and telegraph companies, says: "The cases of carriers and telegraph companies have been specifically mentioned because it is chiefly in these cases that such contracts have been met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, and of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct." *Cooley Torts* (2d ed.), 687, 829. The same view is expressed in *Johnson's Admx. v. Richmond & D. R. Co.*, 86 Va. 975; 11 S. E. Rep. 829.

If the cases relating to limitations of liability by carriers (see *Little Rock, etc., R. Co. v. Cravens*, 7 Am. R. R. & Corp. Rep. 270, and note; *Muldoon v. Seattle City R. Co.*, post), the cases relating to limitation of liability by telegraph companies (*Primrose v. Western Union Tel. Co.*, post), and the cases referred to in this note relating to contracts limiting the liability of the master to his servant be compared and classified, we get the following results, showing roughly the state of the authorities as regards the validity of contracts designed to secure immunity from negligence. Decisions by foreign and inferior courts and overruled cases are disregarded. The three classes of contracts referred to may be designated for convenience as carrier's contracts, telegraph contracts, and employer's contracts. On the general question, whether a contract which exonerates a person from liability for negligence, and which is otherwise unobjectionable, is void, as being contrary to public policy, the states divide themselves into three classes.

First. The courts of the following states have uniformly sustained such contracts, so far as the question of public policy is concerned, and so far as they have been called upon to pass upon the question. In other words, they have never held a contract invalid simply because it stipulated for exemption from liability for negligence. These states are . California, Connecticut, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, South Dakota, Washington (10).

Second. The courts of the following states have held some contracts valid, and others void, according to the nature of the contract or the character of the contracting parties. These are: Georgia, Illinois, Iowa, Louisiana, Maine, Pennsylvania, Wisconsin and the Supreme Court of the United States (8). There is no uniformity, however, in the decisions of these states. Thus, in Illinois, telegraph contracts are held bad and carrier's contracts good, while the reverse is held in Pennsylvania and the federal court. It is proper to say, however,

that the Illinois decisions are somewhat confused. In Georgia telegraph and carrier's contracts are held bad and employer's contracts good. The case of *Adams v. Milwaukee, etc., R. Co.*, ante, p. 354, places the Wisconsin court against such contracts, except in case of the gratuitous passenger.

Third. The courts of the following states have uniformly held such contracts to be against public policy and void, in so far as they have been called upon to adjudicate upon them. In other words, no contract designed to exempt a party from liability for negligence has ever been upheld in these states (except in cases that have been overruled). These states are: Alabama, Arizona, Arkansas, Colorado, Delaware, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia (28).

MULDOON v. SEATTLE CITY RY. CO.

(Supreme Court of Washington, December 30, 1893.)

1. STREET RAILROADS. RIGHT TO LIMIT LIABILITY FOR NEGLIGENCE IN CASE OF GRATUITOUS PASSENGERS. A passenger riding on a street car on a gratuitous pass cannot recover for personal injuries occasioned by the negligence of the company's servants, where the pass contains a condition exempting the company from such liability.

2. CONTRIBUTORY NEGLIGENCE. RIDING ON PLATFORM. It is not negligence per se for a passenger to stand on the front platform of the trailing car of a cable train, where it is customary for passengers to do so, and there is no rule of the company against it.

ACTION by F. M. Muldoon against the Seattle City Railway Company for personal injuries. From a judgment for defendant, plaintiff appeals.

Andrew F. Burleigh, for appellant. *Will H. Thompson*, *Edouard P. Edsen*, and *John E. Humphries*, for respondent.

STILES, J. In this case the bare legal question is up for determination whether a person riding upon a public street car, upon a free pass, can recover for personal injuries suffered by him through the negligence of the street railroad company's servants, when the pass had printed upon the back of it such a condition as the following: "The person accepting this pass assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether by negligence of their agents or otherwise, for injury to the person, or for loss or injury to the property of the person,

using this pass." It is a general rule that carriers of passengers for hire cannot contract against their liability for damages for injuries to their passengers, and this rule has been frequently held to be none the less operative when the evidence of the passenger's right to travel was put in the form of a free pass, if in fact there was a consideration for the issuance of it. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railway Co. v. Stevens*, 95 U. S. 655. The cases above cited expressly refrain from any expression of opinion as to what the law would be were the pass purely a gratuity, with a condition against liability. There are dozens of such cases as *Railroad Co. v. Lockwood* in the reports, and the language of many of them is fully strong enough to justify counsel in claiming that they would cover the case of a gratuitous pass with conditions. However, nearly all of them are cases where drovers or other shippers, being under the necessity of accompanying their shipments of stock or other merchandise to properly care for it while in transit, were granted transportation without payment of fare *eo nomine*, but where the Federal Supreme Court found that there was a valuable consideration, and, therefore, a contract of carriage for hire. But of all the cases called to our attention, or discovered by us in a somewhat extended examination of the subject, there are but eight where the naked question of liability under a free pass with conditions was presented. There may be some others, but they are most likely to be found in New York and Illinois, where the right of a carrier to contract against liability has long been recognized in some form or other. *Railroad Co. v. Read* (1865), 37 Ill. 484, held that a passenger traveling on such a pass could not recover; also, *Kinney v. Railroad Co.* (1869), 34 N. J. Law, 513. *Jacobus v. Railroad Co.* (1873), 20 Minn. 125 (Gil. 110), held the opposite, as did *Rose v. Railroad Co.* (1874), 39 Iowa, 246. *Griswold v. Railroad Co.* (1885), 53 Conn. 371; 4 Atl. Rep. 261, and *Annas v. Railroad Co.* (1886), 67 Wis. 46; 30 N. W. Rep. 282, held there could be no recovery. *Railway Co. v. McGown* (1886), 65 Tex. 643, followed Minnesota and Iowa; but *Quimby v. Railroad Co.* (1890), 150 Mass. 365; 23 N. E. Rep. 205, decided against recovery. The Iowa case was largely based upon a statute of that state, which was construed to prohibit any attempt at limitation by the carrier. We have given these cases in their order of time, so that it may be

seen that there is no absolute weight of authority on this subject. The language of the most of the text-books, of which a dozen or more have been cited, is, so far as any opinion is expressed, for the most part favorable to a right of recovery in such cases; but Beach on Contributory Negligence (§ 172) and Patterson's Railway Accident Law (p. 505) are the only books of this class which give any consideration to the cases above cited.

There can be no question as to the propriety of that rule of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely, without any limiting conditions; and, therefore, such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void. But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz., to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in, and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon conditions like this will tend to demoralize the servants of railway and other carriers, and thereby imperil the limbs and lives of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually traveled, and of all the passengers carried but an infinitesimal number are injured by the carrier's negligence. The precautions adopted by managers and employees of land and water transportation companies are not gauged by the fact that there may be free passengers aboard, and never will be while the

doctrine of respondeat superior has its present healthy existence. Considerations of business success, of competition, of the preservation of expensive machinery, of continuance in employment, of the safety of their own lives and limbs, and, to some extent at least, of humanity, have incalculably more influence upon the servants of these carriers in making them careful than any thought of damage suits in favor of free passengers. It is only in the rarest instances that disasters of this kind occur through recklessness, or through any other cause than the innate weakness of human nature, which cannot forever maintain a perfect guard. The cases from Massachusetts, New Jersey and Wisconsin, above cited, seem to us to present, by conclusive argument, the better reason on this subject, and we adopt the views therein expressed, and hold that the person who accepts a pass with such conditions indorsed on it as those alleged in this case is bound by their terms. It follows that the demurrer to the first defense should have been overruled.

The nonsuit asked by appellant was properly refused. We do not think it can be said that it is negligence per se for a passenger to stand upon the front platform of the trail car in a moving cable train, in the absence of any rule of the company against it, and where it has been the custom for passengers to occupy that position. Doubtless there is more liability that accidents will occur where a car is propelled by cable than where horses are used, but common experience has not discriminated between the two to the extent of changing the rule of law. In most cases of this class the question of contribution is one for the jury. *Wills v. Railroad Co.*, 129 Mass. 351; *Nolan v. Railway Co.*, 87 N. Y. 63.

If the question of the conditional pass be not in the case, and the jury find that the appellant was negligent in causing the sudden stoppage of the car, and that no failure of respondent to use ordinary care to preserve himself from the danger of such accidents contributed proximately to produce his injury, then, upon a new trial, respondent will be entitled to recover; otherwise he will not. Judgment reversed, and cause remanded, with directions to overrule the demurrer to the first defense, and proceed with a new trial. Dunbar, Ch. J., and Hoyt, Scott and Anders, JJ., concur.*

* Reported in 35 Pac. Rep. 422.

1. Railroad companies—limiting liability in case of gratuitous passengers.—We have treated this question in note to *Quimby v. Boston & Maine R. Co.*, 1 Am. R. R. & Corp. Rep. 113. We have re-examined the cases with a view of distinguishing carefully between those in which the pass was an absolute gratuity, and those in which there was some consideration, sufficient to make the holder a passenger for hire within the authorities. In the following cases the pass was an entire gratuity, and the conditions printed thereon were held to be a valid limitation of liability, even as against loss or injury by negligence.

Connecticut.—*Griswold v. New York & New Eng. R. Co.*, 53 Conn. 371. See quotation from this case in 1 Am. R. R. & Corp. Rep. 122, 123. This was the case of a newsboy on a train, and as he plies his occupation for the convenience of passengers as well as for his own profit, it is probable that he would be considered a passenger for hire within the rule as held by the courts.

Illinois.—*Illinois Central R. Co. v. Read*, 37 Ill. 484 (1865); *Arnold v. Illinois Central R. Co.*, 83 Ill. 273 (1876); *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80 (1877).

Maine.—*Rogers v. Kennebec Steamboat Co.*, 29 Atl. Rep. 1069 (1894).

Massachusetts.—*Quimby v. Boston & Maine R. Co.*, 150 Mass. 365; 1 Am. R. R. & Corp. Rep. 113 (1890).

New Jersey.—*Kinney v. Central R. Co.*, 32 N. J. L. 407 (1868); S. C. affirmed 34 N. J. L. 513 (1869).

New York.—*Wells v. New York Central R. Co.*, 24 N. Y. 181 (1862); S. C., 26 Barb. 641 (1858); *Perkins v. New York Central, etc., R. Co.*, 24 N. Y. 196 (1862); *Ulrich v. New York Central, etc., R. Co.*, 108 N. Y. 80 (1888).

Washington.—*Muldoon v. Seattle Street R. Co.*, 35 Pac. Rep. 422 (the principal case).

Wisconsin.—*Annas v. Milwaukee & Northern R. Co.*, 67 Wis. 46 (1886). See quotation from this case in 1 Am. R. R. & Corp. Rep. 121, 122.

In the Illinois cases it is held that the exemption is not good as against gross negligence, amounting to recklessness or willful injury. So in New York it is held that the exemption will not avail as against willful misconduct or recklessness (*Perkins v. New York Central R. Co.*, 24 N. Y. 196 [1862]), and in Wisconsin, as against gross or criminal negligence. *Annas v. Milwaukee & Northern R. Co.*, 67 Wis. 46 (1886). In the New Jersey case cited the exemption was held good as against the negligence of servants, but the court expressly reserves the question whether it would be good as against the negligence of the company itself.

In the following cases, in which the pass was an absolute gratuity, the limitation of liability was held to be invalid as against loss or injury by negligence:

Alabama.—*Mobile v. Ohio R. Co.*, 41 Ala. 486 (1868).

Iowa.—*Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246 (1874).

Minnesota.—*Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125 (1873).

Missouri.—*Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228 (1888).

Pennsylvania.—*Buffalo, etc., R. Co. v. O'Hara*, (Supreme Court) 9 Am. & Eng. R. Cases, 317; 12 Weekly Notes, 473 (1882); *Camden & A. R. Co. v. Bausch*, 6 Cent. Rep. 121; 7 Atl. Rep. 731 (1887).

Texas.—*Gulf, etc., R. Co. v. McGown*, 65 Tex. 640 (1886). See quotation from this case in 1 Am. R. R. & Corp. Rep. 119, 120. The cases cited in this

section should be considered in connection with those cited in the next section, as well as in connection with those on the general subject of limiting liability for negligence, cited in 7 Am. R. R. & Corp. Rep. 284-300.

2. Right to limit liability for negligence in case of passengers not paying fare, but for whose transportation the carrier receives some consideration.—It is generally, if not universally, held that one is a passenger for hire, though traveling on what purports to be a free pass, provided it is given in connection with some transaction, whereby the carrier receives a benefit. Thus, passes issued to drovers or shippers of merchandise in connection with their shipments are held to be for a consideration, and the holders to be passengers for hire. *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298; *Flinn v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 469; *Ohio & Miss. R. Co. v. Selby*, 47 Ind. 471; *Ohio & Miss. R. Co. v. Nickless*, 71 Ind. 271; *Louisville, etc., R. Co. v. Taylor*, 126 Ind. 126; 25 N. E. Rep. 869; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1; *Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 315; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409; 9 S. W. Rep. 346; *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447; *Railroad Co. v. Lockwood*, 17 Wall. 357. So of news agents, express agents, postal clerks and the like. *Yoemans v. Contra Costa Steamship Co.*, 44 Cal. 71; *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455; *Blair v. Erie R. Co.*, 66 N. Y. 513; *Railroad Co. v. Stevens*, 95 U. S. 655.

In the following cases limitations in passes, issued under circumstances which rendered the recipient a passenger for hire, were held to be void as against loss or injury due to the negligence of the carrier or his servants:

Delaware.—*Flinn v. Philadelphia R. Co.*, 1 Houst. (Del.) 469.

Indiana.—*Indiana Central R. Co. v. Mundy*, 21 Ind. 48 (1863); *Ohio & Miss. R. Co. v. Selby*, 47 Ind. 471 (1874); *Louisville, etc., R. Co. v. Taylor*, 126 Ind. 126; 25 N. E. Rep. 869 (1890).

Missouri.—*Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239 (1885).

Ohio.—*Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1 (1869).

Pennsylvania.—*Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 315 (1865).

Texas.—*Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409; 9 S. W. Rep. 346 (1888).

United States.—*Railroad Co. v. Lockwood*, 17 Wall. 357 (1873); *Railroad Co. v. Stevens*, 95 U. S. 655 (1877).

The contrary has been held in the following cases:

Louisiana.—*Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133 (1876).

Massachusetts.—*Bates v. Old Colony R. Co.*, 147 Mass. 255; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506; 31 N. E. Rep. 652 (1892).

New York.—*Bissell v. New York Central R. Co.*, 25 N. Y. 442 (1862); *Poucher v. New York Central R. Co.*, 49 N. Y. 263 (1872); *Boswell v. Hudson Riv. R. Co.*, 5 Bosw. 699 (1860).

Canada.—*Alexander v. Toronto, etc., R. Co.*, 33 U. C. Q. B. 474 (1873).

England.—*McCawley v. Furness R. Co.*, L. R., 8 Q. B. 57 (1872); *Duff v. Great Northern R. Co.*, L. R., 4 Ir. 178 (1878).

3. Conclusions from the authorities.—The reasoning of many of the cases above cited, which hold the limitations of liability in drovers' passes and the like to be invalid, would apply with equal force to the case of passes

which are absolutely free. In *Railroad Co. v. Stevens*, 95 U. S. 655, 660, it is said: "We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked, with apparent confidence, 'May not men make their own contracts, or, in other words, may not a man do what he will with his own?' The question at first sight seems a simple one. But there is a question lying behind that. 'Can a man call that absolutely his own which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service, and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled." No court has held that limitations of liability were bad in case of passengers for hire, and at the same time that they were good in case of gratuitous passengers. While some of the courts have pointed out the distinction between passes with a consideration and passes without a consideration, no court has actually given force to that distinction by holding the limitations in the one bad and in the other good. It is probable that the courts which hold that the limitations in an absolutely free pass are good as against negligence, would hold that they were equally valid though the pass had a consideration. The cases cited show that this is true of the courts of Massachusetts and New York. On the other hand, the courts which hold such limitations invalid in cases of passes with a consideration, would probably hold them equally invalid, though the passes had no consideration. This has already been the case in Pennsylvania and Texas.

The preponderance of authority seems to be decidedly in favor of holding all limitations of liability by carriers to be void as to loss or injury by negligence, whether the service is gratuitous or otherwise. Compare the authorities cited above with those cited in note to *Little Rock, etc., R. Co. v. Craven*, 7 Am. R. R. & Corp. Rep. 284-288. See, also, the preceding and succeeding cases in this volume and notes thereto.

Mr. Wharton doubts whether any passengers are really free. He says: "Railroads are not accustomed to give passes for nothing. The consideration may be the interchange of courtesies with officers of other roads; or it may be the expectation of administrative favors; or it may be the attracting of custom, as in the case of tickets given to newspaper reporters, to persons having the option of sending masses of freight, to drovers, and in a less but still perceptible degree, to lecturers, clergymen and others who circulate among large sections of the community. Or the giving away of a certain number of free tickets may be among the perquisites of the officers of the road, who pay for them by their services." Whart. Neg. § 641.

On the right of carriers to limit liability in case of free passengers he says: "We have already seen that an agreement that a carrier shall not be liable for negligence is void as against the policy of the law. There is no reason why this principle should not apply to cases of free as well as of paid carriage. If 'confidence,' as has just been stated, is a sufficient consideration, then no

passage voluntarily tendered and accepted is gratuitous. But independently of this, it is against public policy that a person using the high and dangerous agency of steam should, in a case on which human life depends, act with a diligence less than a good capable expert should employ in wielding such an agency. If diligence be proportioned to remuneration, steam service would be graded in diligence according to the degree of pay; first class diligence for first class cars; second class diligence for second class cars; minimum diligence for those who pay but little, or do not pay at all. But the law knows no such gradations; when the work is undertaken, then, so far as safety is concerned, the same precautions must be taken for all who are permitted to take passage." Whart. Neg. § 641a. To same effect, 3 Wood. Ry. 1694.

The reasons for holding the same rule in case of gratuitous passengers as in case of passengers for hire are thus given in *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125: "There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government as *parens patriæ* has in protecting the lives and limbs of its subjects.

"So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of passenger for hire—a merely gratuitous passenger—or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can perceive no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned."

PRIMROSE v. WESTERN UNION TELEGRAPH COMPANY.

(Supreme Court of the United States, May 26, 1894.)

1. TELEGRAPH COMPANIES. NOT COMMON CARRIERS. While telegraph companies are instruments of commerce and exercise a public employment and are bound to serve all customers alike, without discrimination and upon reasonable terms, yet they are not common carriers and are not subject to the same liabilities.

2. LIMITING LIABILITY. UNREPEATED MESSAGES. A regulation of a telegraph company requiring the sender of a message to have it repeated, at an

additional charge of one-half the regular rate, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering the message, whether happening by negligence of its servants or otherwise, is reasonable and valid.

3. WHEN STIPULATIONS PRINTED ON BACK OF TELEGRAPH BLANK FORM PART OF CONTRACT. Where a message is written by the sender on a telegraph company's blank having on its face, above the message and below his signature, brief and clear notices that the message is to be sent subject to terms printed on the back of the blank, such terms, so far as not inconsistent with law, form part of the contract between him and the company under which the message is transmitted, although he testifies that he does not remember reading them.

4. CIPHER MESSAGES. REASONABLENESS OF STIPULATIONS AS TO. Stipulations, forming part of the terms under which messages are sent by a telegraph company, that it will not be liable in any case for errors in cipher or obscure messages, and that no employee of the company is authorized to vary this restriction, are not unreasonable or against public policy.

5. MEASURE OF DAMAGES IN CASE OF MISTAKE IN SENDING CIPHER MESSAGES. A telegraph company is not liable to the sender of a message for losses on purchases of wool caused by a mistake in transmitting it, where it was in cipher, wholly unintelligible to the company and its agents, and they were not informed of the nature, importance or extent of the transaction to which it related, or of the probable consequences, if it were transmitted incorrectly, although they knew that the sender was a wool merchant, and that the person addressed was in his employ.

THIS was an action on the case, brought January 25, 1888, by Frank J. Primose, a citizen of Pennsylvania, against the Western Union Telegraph Company, a corporation of New York, to recover damages for a negligent mistake of the defendant's agents in transmitting a telegraphic message from the plaintiff, at Philadelphia, to his agent at Waukeney, in the state of Kansas.

The defendant pleaded (1) not guilty; (2) that the message was an unrepeatable message, and was also a cipher and obscure message, and, therefore, by the contract between the parties under which the message was sent, the defendant was not liable for the mistake. At the trial the following facts were proved and admitted:

On June 16, 1887, the plaintiff wrote and delivered to the defendant, at Philadelphia, for transmission to his agent, William B. Toland, at Ellis, in the state of Kansas, a message upon one of the defendant's printed blanks, the words printed below in italics being the words written therein by the plaintiff, to wit:

“THE WESTERN UNION TELEGRAPH COMPANY.

“THOS. T. ECKERT,
General Manager.

NORVIN GREEN,
President.



“Receiver’s No.	Time Filed 13.	Check.
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“Send the following message,
subject to the terms on back
hereof, which are hereby
agreed to. } June 16, 1887.

“To Wm. B. Toland, Ellis, Kansas.

“Despot am exceedingly busy bay all kinds quo perhaps
bracken half of it mince moment promptly of purchases.

“FRANK J. PRIMROSE.

“ READ THE NOTICE AND AGREEMENT ON BACK OF THIS
BLANK. ”

Upon the back of the message was the following printed
matter :

“ALL MESSAGES TAKEN BY THIS COMPANY ARE
SUBJECT TO THE FOLLOWING TERMS :

“To guard against mistakes or delays, the sender of a message
should order it REPEATED ; that is, telegraphed back to the
originating office for comparison. For this, one-half the regular
rate is charged in addition. It is agreed between the sender of
the following message and this company that said company shall
not be liable for mistakes or delays in the transmission or delivery
or for non-delivery of any UNREPEATED message, whether happen-
ing by negligence of its servants or otherwise, beyond the amount
received for sending the same ; nor for mistakes or delays in the
transmission or delivery or for non-delivery of any REPEATED
message beyond fifty times the sum received for sending the
same, unless specially insured ; nor in any case for delays arising
from unavoidable interruption in the working of its lines, or for
errors in cipher or obscure messages. And this company is
hereby made the agent of the sender, without liability, to forward

any message over the lines of any other company when necessary to reach its destination.

“Correctness in the transmission of a message to any point on the lines of this company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employee of the company is authorized to vary the foregoing.

“No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company’s messengers, he acts for that purpose as the agent of the sender.

“Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

“The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

“NORVIN GREEN, President.

“THOS. T. ECKERT, General Manager.”

On the evening of the same day, an agent of the defendant delivered to Toland, at Waukeney, upon a blank of the defendant company, the message in this form, the written words being printed below in italics:

“THE WESTERN UNION TELEGRAPH COMPANY.

“This company TRANSMITS and DELIVERS messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

“Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of UNREPEATED MESSAGES beyond the amount

of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

"This is an UNREPEATED MESSAGE, and is delivered by request of the sender, under the conditions named above.

"THOS. T. ECKERT, NORVIN GREEN,
General Manager. President.

NUMBER	SENT BY	REC'D BY	CHECK.
<i>Rt.</i>	<i>S.</i>	<i>F. N.</i>	<i>22 Collect 3 extra words.</i>

"RECEIVED at 5 *K. p. m.* *June 16, 1887.*

"Dated *Philadelphia, 16.* *Forwarded from Ellis.*

"To *W. B. Toland, Waukeney, Kansas.*

"*Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase.*

"*FRANK J. PRIMROSE.*"

The difference between the message as sent and as delivered is shown below, where so much of the message sent as was omitted in that delivered is in brackets, and the words substituted in the message delivered are in italics.

"[Despot] *Destroy* am exceedingly busy [bay] *buy* all kinds quo perhaps bracken half of it mince moment promptly of purchase [s]."

By the private cipher code made and used by the plaintiff and Toland, the meaning of these words was as follows :

"Yours of the [fifteenth] *seventeenth* received; am exceedingly busy; [I have bought] *buy* all kinds, five hundred thousand pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately, promptly of [purchases] purchase."

The plaintiff testified that on June 16, 1887, he wrote the message in his own office on one of a bunch or book of the defendant's blanks which he kept at hand, and sent it to the defendant's office at Philadelphia; that he had a running account with the defendant's agent there, which he settled monthly, amounting to \$180 for that month; that he did not then read, and did not remember that he had ever before read, the printed matter on the back of the blanks; and that he paid the usual rate of one dollar

and fifteen cents for this message, and did not pay for a repetition or insurance of it.

He also testified that he then was, and for many years had been, engaged in the business of buying and selling wool all over the country, and had employed Toland as his agent in that business, and early in June, 1887, sent him out to Kansas and Colorado, with instructions to buy 50,000 pounds, and then to await orders from him before buying more; that, before June twelfth, Toland bought 50,000 pounds, and then stopped buying; and that he had sent many telegraphic messages to Toland during that month and previously, using the same code.

The defendant's agent at Philadelphia, called as a witness for the plaintiff, testified that he sent this message for the plaintiff, and knew that he was a dealer in wool, and that Toland was with him, but in what capacity he did not know; that he had frequently sent messages for him, and considered him one of his best customers during the wool season; that telegraphic messages by the present system were sent and received by sound, and were all dots and dashes; that "b" was a dash and three dots, and "y" was two dots, a space, and then two dots; and that the difference between "a" and "u" was one dot, "a" being a dot and a dash, "u" two dots and a dash, and the pause upon the last touch of the "u;" that an experienced telegraph operator, if the words were properly rapped out, and he was paying proper attention, could not well mistake the one for the other, but might be misled if he was not careful; and that it was very likely that another dot could be put in if there was any interruption in the wire. He further testified that there was a great difference between the words "despot" and "destroy" in telegraphic symbols; and that the letter "s" was made by three dots, so that, if an operator received the word "purchases" over the wires, and wrote down "purchase," he omitted three dots from the end of the word.

The plaintiff introduced depositions, taken in September, 1888, of one Stevens and one Smith, who were respectively telegraph operators of the defendant at Brookville and at Ellis, in the state of Kansas, on June 16, 1887.

Stevens testified that Brookville was a relay station of the company, at which messages from the east were repeated westward; that on that day one Tindall, his fellow operator in the Brook-

ville office, handed him a copy in Tindall's handwriting of the message in question (an impression copy of which he identified and annexed to his deposition), containing the words "despot" and "bay," and he immediately transmitted it, word for word, to Ellis; that the equipment of the office at Brookville was in every respect good and sufficient, and that he had no recollection of the wires between it and Ellis having been in other than good condition on that day.

Smith testified that on that day he received the message at Ellis from Brookville, and immediately wrote it down, word for word, just as received (and identified and annexed to his deposition an impression copy of what he then wrote down), containing the words "destroy" and "buy," and transmitted it, exactly as he received it, to Waukeney, to which Toland had directed any messages for him to be forwarded; and that the office at Ellis was well and sufficiently equipped for its work, but he could not recall what was the condition of the wires between it and Brookville.

The plaintiff also introduced evidence tending to show that June 16, 1887, was a bright and beautiful day at Ellis and Waukeney; that Toland, upon receiving the message at Waukeney, made purchases of about 300,000 pounds of wool, and that the plaintiff, in settling with the sellers thereof, suffered a loss of upward of \$20,000.

The Circuit Court, following *White v. Telegraph Co.*, 5 McCrary, 103; 14 Fed. Rep. 710, and *Jones v. Telegraph Co.*, 18 Fed. Rep. 717, ruled that there was no evidence of gross negligence on the part of the defendant; and that as the message had not been repeated, the plaintiff, by the terms printed upon the back of the message, and referred to above his signature on its face, could not recover more than the sum of one dollar and fifteen cents, which he had paid for sending it. The plaintiff not claiming that sum, the court directed a verdict for the defendant, and rendered judgment thereon. The plaintiff tendered a bill of exceptions, and sued out this writ of error.

Geo. Junkin and Jos. de F. Junkin, for plaintiff in error.
S. W. Pettit, John F. Dillon and Geo. H. Fearons, for defendant in error.

GRAY, J. (*after stating the facts*). This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the following message, subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line: "Read the notice and agreement on back of this blank."

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; [2] nor for mistakes or delays in the transmission or delivery or for non-delivery of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; [3] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages." After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employee of the company is authorized to vary the foregoing." "[4] The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The conditions or restrictions, the reasonableness and validity of which are directly involved in this case, are that part of the first by which the company is not to be liable for mistakes in the transmission or delivery of any message beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that part of the third by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are, therefore, bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers. Their duties are different, and are performed in different ways; and they are not subject to the same liabilities. *Express Co. v. Caldwell*, 21 Wall. 264, 269, 270; *Telegraph Co. v. Texas*, 105 U. S. 460, 464.

The rule of the common law by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods. The identity of the goods which he receives with those which he delivers can hardly be mistaken. Their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are intrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols, by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement. It is of no intrinsic value. Its importance cannot be estimated, except by the

sender, and often cannot be disclosed by him without danger of defeating his purpose. It may be wholly valueless, if not forwarded immediately ; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

As said by Mr. Justice Strong, speaking for this court, in *Express Co. v. Caldwell*, above cited : " Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. *Railroad Co. v. Lockwood*, 17 Wall. 357 ; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 442 ; 9 Sup. Ct. Rep. 469, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence, and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that " where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Hart v. Railroad Co.*, 112 U. S. 331, 343 ; 5 Sup. Ct. Rep. 151.

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence, but only to require the sender of the message to have it

repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering or for not delivering a message, whether happening by negligence of its servants or otherwise.

In *Telegraph Co. v. Hall*, 124 U. S. 444, 453; 8 Sup. Ct. Rep. 577, the effect of such a regulation was presented by the certificate of the Circuit Court, but was not passed upon by this court, because it was of opinion that, upon the facts of the case, the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in *McAndrew v. Telegraph Co.*, 17 C. B. 3, and in *Baxter v. Telegraph Co.*, 37 U. C. Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.

In the earliest American case, decided by the Court of Appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: "The public are admonished by the notice that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that, if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important, and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk, at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company liable for any mistake that may occur." *Camp v. Telegraph Co.*, 1 Metc. (Ky.) 164, 168.

In *Telegraph Co. v. Carew*, 15 Mich. 525, 535, 536, the Supreme Court of Michigan held that a similar regulation was a valid part of the contract between the company and the sender, whether he read it or not. "The regulation," said Chief Justice Christiancy, "of most, if not all, telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message or any other circumstance which may affect the question." "The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing, and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions."

In *Birney v. Telegraph Co.*, 18 Md. 341, 358, the Court of Appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit.

In *Telegraph Co. v. Gildersleve*, 29 Md. 232, 246, 248, the same court, speaking by Mr. Justice Alvey (since chief justice of Maryland and of the Court of Appeals of the District of Columbia), said: "The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for the purpose." "The appellant could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own willful misconduct or gross negligence or any conduct inconsistent with good faith; nor has it attempted by its rules and regulations to afford itself such exemption. It was bound to use due diligence, but not to use extraordinary care and precaution. The appellee, by requiring the message to be repeated, could have assured himself of its dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or, by special contract for insurance, could have secured himself against all consequences of non-delivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk

of the less expensive terms of sending his message ; and, having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through, in order to fix the liability on the company."

In *Passmore v. Telegraph Co.*, 9 Phila. 90 ; 78 Penn. St. 238, at the trial in the District Court of Philadelphia, there was evidence that Passmore, of whom one Edwards had offered to purchase a tract of land in West Virginia, wrote and delivered to the company at Parkersburg, upon a blank containing similar conditions, a message to Edwards, at Philadelphia, in these words : "I hold the Tibbs tract for you ; all will be right," — but which, as delivered by the company in Philadelphia, was altered by substituting the word "sold" for "hold ;" and that Edwards thereupon broke off the contract for the purchase of the land, and Passmore had to sell it at a great loss. The verdict being for the plaintiff, the court reserved the question whether the defendant was liable, inasmuch as the plaintiff had not insured the message nor directed it to be repeated, and afterwards entered judgment for the defendant, notwithstanding the verdict, in accordance with an opinion of Judge Hare, the most important parts of which were as follows :

"A railway, telegraph or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence ; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as reason, which is said to be the life of the law, can approve ; or, at the least, such as it need not condemn. By no device can a body corporate avoid liability for fraud, for willful wrong or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule which, in marking out a path plain and easily

accessible, as that in which the company guarantees that every one shall be secure, declares that, if any man prefers to walk outside of it they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and, as such, upheld by the courts."

"The function of the telegraph differs from that of the post office in this: that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument that the electric fluid, which is used as the medium of communication, is liable to perturbations arising from thunder storms and other natural causes. It is, therefore, obvious that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or, in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came."

"Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition." 9 Phila. 92-94; 78 Penn. St. 242-244.

The judgment was affirmed by the Supreme Court of Pennsylvania, for the reasons given by Judge Hare and above stated.

78 Penn. St. 246; *Telegraph Co. v. Stevenson*, 128 Penn. St. 442, 455; 18 Atl. Rep. 441.

In *Breese v. Telegraph Co.*, 48 N. Y. 132, the plaintiffs' agent wrote, at his own office in Palmyra, on one of the company's blanks, substantially like that now before us, and delivered to the company at Palmyra, a message addressed to brokers in New York, and in these words, "Buy us seven (\$700) hundred dollars in gold." In the statement of facts upon which the case was submitted, it was agreed that he had never read the printed part of the blank, and that the "message thus delivered was transmitted from the office at Palmyra as written; but, by some error of the defendant's operators working between Palmyra and New York," it was received in New York and delivered in this form, "Buy us seven thousand dollars in gold," and the brokers accordingly bought that amount for the plaintiffs, who sold it at a loss. It was held that there was no evidence of negligence on the part of the company, and that, the message not having been repeated, the company was not liable.

In *Kiley v. Telegraph Co.*, 109 N. Y. 231, 235-237; 16 N. E. Rep. 75, a similar decision was made, the court saying: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other states of the Union and in England. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this state, and generally elsewhere, been upheld as reasonable." "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there remains

unexplained. It was not shown that the failure was due to the willful misconduct of the defendant, or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation."

In the Supreme Judicial Court of Massachusetts, the reasonableness and validity of such regulations have been repeatedly affirmed. *Ellis v. Telegraph Co.*, 13 Allen, 226; *Redpath v. Telegraph Co.*, 112 Mass. 71; *Grinnell v. Telegraph Co.*, 113 Mass. 299; *Clement v. Telegraph Co.*, 137 Mass. 463.

There are cases, indeed, in which such regulations have been considered to be wholly void. It will be sufficient to refer to those specially relied on by the learned counsel for the plaintiff, many of which, however, upon examination, appear to have been influenced by considerations which have no application to the case at bar.

Some of them were actions brought, not by the sender, but by the receiver, of the message, who had no notice of the printed conditions until after he received it, and could not, therefore, have agreed to them in advance. Such were *Telegraph Co. v. Dryburg*, 35 Penn. St. 298; *Harris v. Telegraph Co.*, 9 Phila. 88; and *De la Grange v. Telegraph Co.*, 25 La. Ann. 383.

Others were cases of night messages, in which the whole provision as to repeating was omitted, and a sweeping and comprehensive provision substituted, by which, in effect, all liability beyond the price paid was avoided. *True v. Telegraph Co.*, 60 Maine, 9, 18; *Bartlett v. Telegraph Co.*, 62 Maine, 209, 215; *Candee v. Telegraph Co.*, 34 Wis. 471, 476; *Hibbard v. Telegraph Co.*, 33 Wis. 558, 564. In *Bartlett's* case the court said: "Most, if not all, the cases upon this subject, refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion on the ground that, owing to the liability to error from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated, the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and, as the person sending the message

is presumed to be the best judge of its importance, he must, on his own responsibility, make his election whether to have it repeated." 62 Maine, 216, 217.

The passage cited from the opinion of the Circuit Court of Appeals in *Delaware & A. Telegraph & Telephone Co. v. State*, 3 U. S. App. 30, 105; 2 C. C. A. 1, and 50 Fed. Rep. 677, in which the same judge who had decided the present case in the Circuit Court said, "It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment," had regard, as is evident from the context, and from the reference to *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468, to those rules only which require persons or corporations exercising a public employment to serve all alike, without discrimination, and which make them subject to legislative regulation.

In *Rittenhouse v. Independent Line, etc.*, 1 Daly, 474; 44 N. Y. 263, and in *Turner v. Telegraph Co.*, 41 Iowa, 458, it does not appear that the company had undertaken to restrict its liability by express stipulation.

The Indiana decisions cited appear to have been controlled by a statute of the state enacting that telegraph companies should "be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting or delivering despatches." *Telegraph Co. v. Meek*, 49 Ind. 53; *Telegraph Co. v. Fenton*, 52 Ind. 1.

The only cases cited by the plaintiff in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy and void, appear to be *Tyler v. Telegraph Co.*, 60 Ill. 421; 74 Ill. 168; *Ayer v. Telegraph Co.*, 79 Maine, 493; 10 Atl. Rep. 495; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Telegraph Co. v. Crall*, 38 Kans. 679; 17 Pac. Rep. 309; *Telegraph Co. v. Howell*, 38 Kans. 685; 17 Pac. Rep. 313; and a charge to the jury by Mr. Justice Woods, when Circuit judge, as reported in *Dorgan v. Telegraph Co.*, 1 Am. Law T. (N. S.) 406; Fed. Cas. No. 4,004, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question is to be found in *Tyler v. Telegraph Co.*, above cited.

In that case the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message addressed to a broker: "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1,000)." It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The Supreme Court of Illinois held that the stipulation was "unjust, unconscionable, without consideration and utterly void." 60 Ill. 439.

The propositions upon which that decision was based may be sufficiently stated, in the very words of the court, as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender, is a contract or not, depends on circumstances," and "whether he had knowledge of its terms, and consented to its restrictions, is for the jury to determine as a question of fact upon evidence aliunde." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred," and "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damage occasioned by causes wholly within their own control," but "must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable." 60 Ill. 431-433.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not, or else to allow to the stipulation no effect whatever; for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision was restated by the court when the case came before it a

second time as follows: "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and, when the charges were paid, the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent of the original charges." 74 Ill. 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever; whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender, and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss by contract, and that such a regulation as the one under which appellees defended is a reasonable regulation, and amounts to a contract." And, again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Ill. 430, 431, 435.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back, he did not venture to say that he had not read it; still less that he had not

read the brief and clear notices thereof upon the face of the message, both above the place for writing the message and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them only, and was in these words: "Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot," "buy" instead of "bay," and "purchase" instead of "purchases."

The message having been sent and received on June sixteenth, the mistake, in the first word, of "destroy" for "despot," by which, for a word signifying to those understanding the cipher, that the sender of the message had received from the person to whom it was addressed his message of June fifteenth, there was substituted a word signifying that his message of June seventeenth had been received (which was evidently impossible), could have had no other effect than to put him on his guard as to the accuracy of the message delivered to him.

The mistake of substituting for the last word "purchases," in the plural, the word "purchase," in the singular, would seem to have been equally unimportant, and is not suggested to have done any harm.

The remaining mistake, which is relied on as the cause of the injury for which the plaintiff seeks to recover damages in this action, consisted in the change of a single letter, by substituting "u" for "a," so as to put "buy" in the place of "bay." By the cipher code, "buy" had its common meaning, though the message contained nothing to suggest to any one, except the sender or his agent, what the latter was to buy; and the word "bay," according to that code, had (what no one without its assistance could have conjectured) the meaning of "I have bought."

The impression copies of the papers kept at the defendant's offices at Brookville and Ellis, in the state of Kansas (which were annexed to the depositions of operators at those offices, and given in evidence by the plaintiff at the trial), prove that the message

was duly transmitted over the greater part of its route, and as far as Brookville; for they put it beyond doubt that the message, as received and written down by one of the operators at Brookville, was in its original form, and that, as written down by the operator at Ellis, it was in its altered form. While the testimony of the deponents is conflicting, there is nothing in it to create a suspicion that either of them did not intend to tell the truth; nor is there anything in the case tending to show that there was any defect in the defendant's instruments or equipment, or that any of its operators were incompetent persons.

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing or in transmitting it to Ellis, or else in a mistake of the operator at Ellis in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irresistible that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within narrower

limits than were allowed to common carriers in *Hart v. Railroad Co.*, already cited, in which five horses were delivered by the plaintiff to a railroad company for transportation under a bill of lading, signed by him and by its agent, which stated that the horses were to be transported upon the terms and conditions thereof, "admitted and accepted by" the plaintiff "as just and reasonable," and that freight was to be paid at a rate specified, on condition that the carrier assumed a liability not exceeding \$200 on each horse; and the Circuit Court, and this court on writ of error, held that the contract between the parties could not be controlled by evidence that one of the horses was killed by the negligence of the railroad company, and was a race horse, worth \$15,000. 2 McCrary, 333; 7 Fed. Rep. 630; 112 U. S. 331; 5 Sup. Ct. Rep. 151.

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages;" and that it is further stipulated that "no employee of the company is authorized to vary the foregoing," which evidently includes this as well as other restrictions.

It is difficult to see anything unreasonable or against public policy in a stipulation that if the handwriting of a message delivered to the company for the transmission is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message, and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employee of the company

could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in *Telegraph Co. v. Hall*, 124 U. S. 444 ; 8 Sup. Ct. Rep. 577.

In *Hadley v. Baxendale* (decided in 1854), 9 Exch. 345, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in *Telegraph Co. v. Hall*, above cited, and in *Howard v. Manufacturing Co.*, 139 U. S. 199, 206, 207 ; 11 Sup. Ct. Rep. 500, Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally — i. e., according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 354, 355.

In *Sanders v. Stuart*, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for goods, whereby the plaintiffs lost profits, which they would otherwise have made by the transaction, to the amount of £150, Lord Chief Justice Coleridge, speaking for himself and Lords Justices Brett and Lindley, said: "Upon the facts of this case, we think that the rule in *Hadley v. Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion, how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;' for the simple reason that the defendant, at least, did not know what his contract was about, nor what nor whether any damage would follow from the breach of it. And for the same reason, viz., the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and indeed intentionally procured by, the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally — i. e., according to the usual course of things — from the breach' of such a contract as this." 1 C. P. Div. 326, 328; 45 L. J. C. P. 682, 684.

In *Telegraph Co. v. Gildersleve*, already referred to, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the Court of Appeals of Maryland, and applying the rule of *Hadley v. Baxendale*, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars in gold, it was not

shown, nor was it put to the jury to find, that the 'appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold,' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars by those not initiated; and, if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Md. 232, 251.

In *Baldwin v. Telegraph Co.*, which was an action by the senders against the telegraph company for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the Court of Appeals of New York, said: "The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance." "The dispatch not indicating any purpose other than that of obtaining such informa-

tion as an owner of property might desire to have at all times, and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale or a sale at an undervalue, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would naturally and necessarily result from the failure to deliver the message would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752. See, also, *Hart v. Cable Co.*, 86 N. Y. 633.

The Supreme Court of Illinois, in *Tyler v. Telegraph Co.*, above cited, took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Ill. 434. And in the recent case of *Cable Co. v. Lathrop* the same court said: "It is clear enough that, applying the rule in *Hadley v. Baxendale*, *supra*, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justified in saying that it can contain no information of value as pertaining to a business transaction, and a failure to send it or a mistake in its transmission can reasonably result in no pecuniary loss." 131 Ill. 575; 23 N. E. Rep. 585.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. *Candee v. Telegraph Co.*, 34 Wis. 471, 479-481; *Beaupre v. Telegraph Co.*, 21 Minn. 155; *Mackay v. Telegraph Co.*, 16 Nev. 222; *Daniel v. Telegraph Co.*, 61 Tex. 452; *Cannon v. Telegraph Co.*, 100 N. C. 300; 6 S. E. Rep. 731; *Telegraph Co. v. Wilson*, 32 Fla. 527; 14 South. Rep. 1; *Behm v. Telegraph Co.*, 8 Biss. 131; Fed. Cas. No. 1,234; *Telegraph Co. v. Martin*, 9 Bradw. 587; *Abeles v. Telegraph Co.*, 37 Mo. App. 554; *Kinghorne v. Telegraph Co.*, 18 U. C. Q. B. 60, 69.

In the present case the message was, and was evidently intended

to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance or extent of the transaction to which it related or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties, when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the Circuit Court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message. Judgment affirmed. Mr. Chief Justice Fuller and Mr. Justice Harlan dissented. Mr. Justice White, not having been a member of the court when this case was argued, took no part in its decision.*

Telegraph companies — limiting liability — unrepeated messages.— The foregoing decision seems hardly in line with the decisions by the same court in regard to contracts by which common carriers have sought to secure immunity from the consequences of their negligence. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Stevens*, 95 U. S. 655; *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397. Nor does the opinion show fairly the condition of the authorities upon the subject. Referring to the regulation in question as to unrepeated messages, the court says: "But the reasonableness and validity of such regulations have been upheld in *McAndrew v. Telegraph Co.*, 17 C. B. 3, and in *Baxter v. Telegraph Co.*, 37 U. C. Q. B. 470, as well as by the great preponderance of authority in this country." In a former note on the subject we expressed the view that the authorities were pretty evenly divided on the question, but "that the present tendency of judicial sentiment and decision is to the effect that telegraph companies are precluded from stipulating against the consequences of their own negligence, or that of their agents or servants." It seems to us that this remained true up to the time the principal case was decided, but that case will undoubtedly exert a potent influence towards reversing the tendency.

* Reported in 154 U. S. 1; 14 Sup. Ct. Rep. 1078.

In the following cases the usual stipulation in regard to unrepeatd messages was held to be valid and binding, and to exempt the company from liability for mistake or delay in the transmission or delivery of messages, though the mistake or delay was due to negligence.

California.—Hart v. Western Union Tel. Co., 66 Cal. 579 (1885). This case was disapproved in Western Union Tel. Co. v. Cook, (Ct. of App.) 61 Fed. Rep. 624.

Maryland.—Birney v. Telegraph Co., 18 Md. 341; Telegraph Co. v. Gildersleeve, 29 Md. 232 (1868). In the former case the question was not decided, though the court recognizes the validity of the stipulation. In the latter case the court apparently treats the stipulation as being effectual merely to shift the burden of proof. Following the quotation made by the court in the principal case, is the following: "If, then, the appellant dispatched the appellee's message in due course, and with the ordinary care to secure its safe and correct transmission, and was guilty of no negligence in regard to its delivery to the party to whom it was addressed, the obligation under the contract was performed, and the onus of proof was upon the appellee to show affirmatively that there had been negligence, or want of good faith, either in dispatching the message, or in regard to its delivery."

Massachusetts.—Ellis v. American Tel. Co., 13 Allen, 226 (1866); Redpath v. Western Union Tel. Co., 112 Mass. 71 (1873); Grinnell v. Western Union Tel. Co., 113 Mass. 299 (1873); Clement v. Western Union Tel. Co., 137 Mass. 463 (1884). In the last case the stipulation was held to be good even as against gross negligence.

Michigan.—Western Union Tel. Co. v. Carew, 15 Mich. 525 (1867). This case does not really decide that the stipulation as to unrepeatd messages is valid, though the language of the court is to that effect. It appears that the plaintiff sent a message from Detroit to Baltimore, that the defendant's lines only extended to Philadelphia, and that from there the message was sent over a connecting line. The mistake out of which the suit arose occurred on the latter line. The contract not only contained the usual stipulation as to unrepeatd messages, but also the following: "Nor is any liability assumed by this company for any error or neglect of any other company over whose lines this message may be sent to reach its destination. And this company is hereby made the agent of the sender of this message to forward it over the lines extending beyond those of this company." The court says: "The contract which the evidence tended to show was for a single transmission by the company over its own line without repetition, and for delivering the message as the agent of the plaintiff to the next line in its course to Baltimore, a contract which the evidence tended to show had been fully complied with. The contract, therefore, was essentially different from that declared upon." p. 537.

Missouri.—Wann v. Western Union Tel. Co., 37 Mo. 472 (1866).

Nebraska.—Becker v. Western Union Tel. Co., 11 Neb. 87 (1881). In this case the stipulation was held good except as against gross negligence or willful misconduct. Since this decision the rule has been changed by statute. Kemp v. Western Union Tel. Co., 28 Neb. 661; 2 Am. R. R. & Corp. Rep. 128 (1890); Western Union Tel. Co. v. Lowry, 32 Neb. 732; 49 N. W. Rep. 707.

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New York.—Breese v. U. S. Tel. Co., 48 N. Y. 132 (1871); Kiley v. Western Union Tel. Co., 109 N. Y. 231 (1888); Riley v. Western Union Tel. Co., 26 N. Y. Supp. 532 (1893); Riley v. Western Union Tel. Co., 28 N. Y. Supp. 581 (1894). But in these cases the stipulation is held not to be good as against gross negligence.

Pennsylvania.—Passmore v. Western Union Tel. Co., 9 Phila. 90 (1872); affirmed in 78 Penn. St. 239 (1875). The same rule is approved but not applied in Western Union Tel. Co. v. Stevens, 128 Penn. St. 442; 18 Atl. Rep. 441 (1889). It is held that the stipulation does not affect the sendee of a message. New York & W. Printing Tel. Co. v. Dryburg, 37 Penn. St. 298 (1860); Harris v. Western Union Tel. Co., 9 Phila. 88 (1872); Tobin v. Western Union Tel. Co., 146 Penn. St. 375; 23 Atl. Rep. 324 (1892).

South Dakota.—Kirby v. Western Union Tel. Co., 8 Am. R. R. & Corp. Rep. 410 (1893).

United States Supreme Court.—The principal case.

Canada.—Baxter v. Dominion Tel. Co., 37 U. C. Q. B. 470 (1875).

England.—MacAndrew v. Electric Tel. Co., 17 C. B. 3; 84 E. C. L. R. 3 (1855).

On the other hand, the stipulation in question has been held to be against public policy and void as against negligence of the company or its servants in the following cases:

Alabama.—Western Union Tel. Co. v. Way, 83 Ala. 542 (1887); American Union Tel. Co. v. Daughtery, 89 Ala. 191 (1889).

Arkansas.—Western Union Tel. Co. v. Short, 53 Ark. 434; 3 Am. R. R. & Corp. Rep. 564 (1890).

Georgia.—Western Union Tel. Co. v. Blanchard, 68 Ga. 299 (1882). The following cases support the same view, but relate to night messages at half rates: Western Union Tel. Co. v. Fontaine, 58 Ga. 433 (1877); Western Union Tel. Co. v. Shotter, 71 Ga. 760 (1883).

Illinois.—Tyler v. Western Union Tel. Co., 60 Ill. 421 (1871); S. C., 74 Ill. 168 (1874).

Indiana.—Western Union Tel. Co. v. Fenton, 52 Ind. 1 (1875). This decision is based both upon the common law and upon a statute. The statute provided that telegraph companies should "be liable for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting or delivering dispatches." The court says: "But, aside from the unreasonableness of a contract by which the prompt delivery of a message is made to depend upon its repetition at an additional expense, the defendant could not contract against liability for its own negligence. * * * We see no reason for any distinction between telegraph companies and common carriers of goods in this respect."

It has been held in numerous cases that the stipulation does not apply to a suit for a penalty imposed by statute. Western Union Tel. Co. v. Buchanan, 35 Ind. 429; Western Union Tel. Co. v. Adams, 87 Ind. 598; Same v. Young, 93 Ind. 118; Same v. Meredith, 95 Ind. 93; Same v. Jones, 95 Ind. 228.

Iowa.—Sweatland v. Illinois & Miss. Tel. Co., 27 Iowa, 433 (1869); Manville v. Western Union Tel. Co., 37 Iowa, 214 (1873); Harkness v. Western Union Tel. Co., 73 Iowa, 190 (1887). The rule in this state rests upon common-law

principles. A statute provides that "the proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, as well as for all damages resulting from a failure to perform any other duties required by law." In the case first cited there was a question whether this statute applied, as the message in question was an interstate message. The court, per Dillon, Ch. J., says:

"Telegraph companies, like railroad companies, owe important duties to the public. Generally there are no competing lines, and, if so, the business is necessarily in the hands of a few. These companies must act in good faith toward the public, and cannot, by general conditions, demand unreasonable concessions from those proposing to send messages. It is not necessary to discuss what might be done by special contract. But I deny that companies can adopt general printed rules, exacting, as a condition of sending messages, that the sender shall exonerate or release the company from damages caused by defective instruments, or by the want of proper skill in the operators, or by their failure to use due care." pp. 450, 451.

The case of *Garrett v. Western Union Tel. Co.*, 88 Iowa, 257; 4 Am. R. R. & Corp. Rep. 665 (1891), strongly supports the same conclusions, although the case relates to a half-rate message.

Kansas.—*Western Union Tel. Co. v. Crall*, 38 Kans. 679; 17 Pac. Rep. 309 (1888); *Western Union Tel. Co. v. Howell*, 38 Kans. 685; 17 Pac. Rep. 313 (1888). In these cases the negligence of the company was found to be gross, but the tendency of the opinion is that a limitation of liability for negligence in any degree is void.

Kentucky.—*Smith v. Western Union Tel. Co.*, 83 Ky. 104 (1885). See quotation from this case in 3 Am. R. R. & Corp. Rep. 573. No reference is made to the prior case of *Camp v. Western Union Tel. Co.*, 1 Met. (Ky.) 164 (1858), but, of course, in so far as it lays down a contrary rule, it was overruled. It may be doubted whether the court in the latter case decided anything more than that there was no evidence to show negligence, and hence no evidence of liability. There was no evidence of negligence but the fact of a mistake, and the court, after commenting upon the difficulties of the service, says: "It may be, therefore, reasonably presumed that the failure to deliver this message correctly, was the result of a mistake to which such communications are liable, and which will sometimes occur, even when the utmost care and skill are exercised."

Maine.—*Ayer v. Western Union Tel. Co.*, 79 Maine, 493 (1887). In this case the court says: "Telegraph companies are quasi public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may work irreparable mischief to individuals and communities. It is essential for the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty than should a carrier of passengers, or any other party engaged in a public business. This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the

performance of their plain duty. It is no hardship upon them. They engage in the business voluntarily. They have the entire control of their servants and instruments. They invite the public to intrust messages to them for transmission. They may insist on their compensation in advance. Why, then, should they refuse to perform the common duty of care and diligence? Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality, as a guard against their own negligence? It seems clear to us that, having undertaken the business, they ought, without qualification, to do it carefully, or be responsible for their want of care."

Prior to this decision the court had held the usual stipulation for exemption in half-rate or night messages to be unreasonable and void. *True v. International Tel. Co.*, 60 Maine, 9 (1872); *Bartlett v. Western Union Tel. Co.*, 62 Maine, 209 (1883). And all these cases are followed and approved in *Fowler v. Western Union Tel. Co.*, 80 Maine, 381 (1888), which related to a half-rate message.

Minnesota.—*Francis v. Western Union Tel. Co.*, 59 N. W. Rep. 1078 (1894).

North Carolina.—In the first decision in this state the stipulation in question was held to be valid and binding even as against negligence. *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334 (1883). But this decision was doubted in *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; 12 S. E. Rep. 427 (1890); and finally overruled in *Brown v. Postal Telegraph Co.*, 111 N. C. 187; 16 S. E. Rep. 179 (1892). In the latter case the court says: "In *Pegram v. Telegraph Co.*, 97 N. C. 57; 2 S. E. Rep. 256, it is said that the stipulation on the back of the blanks restraining liability for unrepeatd messages, where the complaint is not a mistake in the message, but for failure or delay in delivery, is unreasonable and void. In *Cannon v. Telegraph Co.*, 100 N. C. 300; 6 S. E. Rep. 731, the doctrine in *Lassiter's* case is affirmed, but the language of the opinion in *Telegraph Co. v. Hall*, 124 U. S. 444; 8 Sup. Ct. Rep. 577, is quoted with approval: 'Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss, based upon changes in the market value, are clearly within the rule for estimating damages.' In *Thompson v. Telegraph Co.*, 107 N. C. 449; 12 S. E. Rep. 427, reasserting that this stipulation, so far as delay is concerned, is void, a doubt is intimated as to its validity at all; and it is plainly said, though not necessary to be declared in the decision upon the point involved in that case: 'The more recent cases, founded upon the more thorough investigation and thought given to the subject, that any stipulation restricting the liability of the telegraph company for negligence, even as to mistakes in transmission, is void.' We refer to the cases in other states cited in the opinion just referred to. *Gillis v. Telegraph Co.*, 61 Vt. 461; 17 Atl. Rep. 736; *Ayer v. Telegraph Co.*, 79 Maine, 493; 10 Atl. Rep. 495. We have come to the conclusion, after a natural hesitation, to overrule a decision of a majority of this court announced by the late very learned chief justice, that

the true principle is that telegraph companies are such corporations created for the public benefit, endowed with special privileges, such as the right of eminent domain, performing the most important functions of commerce, and, in cases where celerity and dispatch are necessary, taking the place of the postal service, that at least ordinary skill and diligence are required of them, and that public policy forbids that they should be protected from liability for damage by reason of any degree of negligence. Gray Com. Tel. § 46, and cases there cited; Thomp. Elect. §§ 235, 236, and note. As the art of telegraphy has now attained such high efficiency, there is less reason why any rule of safeguard to the public interest should be relaxed."

Ohio.—Telegraph Co. v. Griswold, 37 Ohio St. 301 (1881).

Tennessee.—Peffer v. Telegraph Co., 87 Tenn. 554 (1889). The same rule is held as to the usual stipulation in half-rate messages. Marr v. Western Union Tel. Co., 85 Tenn. 529 (1887).

Texas.—In the case of Western Union Tel. Co. v. Hearne, 77 Tex. 83 (1890), speaking of the stipulation as to unrepeatd messages, the court says: "We think it should now be considered settled in this state that this limitation of liability by special contract is valid and binding, and that no recovery can be had for an error committed in transmitting an unrepeatd message unless it be 'shown by direct testimony, or by the facts and circumstances of the case, that the error was caused by the misconduct, fraud or want of due care on the part of the company, its agents or servants.'"

This rule was first laid down in Western Union Tel. Co. v. Neill, 57 Tex. 283 (1882), as to a half-rate message, but was affirmed and applied to the stipulation as to unrepeatd messages in Womack v. Western Union Tel. Co., 58 Tex. 176 (1882), and Western Union Tel. Co. v. Edsall, 63 Tex. 668 (1885), and is recognized as the established rule by the Court of Civil Appeals in Western Union Tel. Co. v. Elliott, 27 S. W. Rep. 219 (1894). To hold that the stipulation is not good as against a want of due care, is simply to hold that it is not good as against negligence. The stipulation is held not to apply at all to a failure or delay in delivery. G., C. & S. F. R. Co. v. Wilson, 69 Tex. 739; Western Union Tel. Co. v. Broesche, 72 Tex. 654; Western Union Tel. Co. v. Lyman, 22 S. W. Rep. 656; Western Union Tel. Co. v. Linn, 23 S. W. Rep. 895.

Utah.—Wertz v. Western Union Tel. Co., 7 Utah, 446; 27 Pac. Rep. 172 (1891).

Vermont.—Gillis v. Western Union Tel. Co., 61 Vt. 461 (1889).

Wisconsin.—Thompson v. Western Union Tel. Co., 64 Wis. 531 (1885). The same view is supported by the following cases relating to stipulations in half-rate messages: Hibbard v. Western Union Tel. Co., 33 Wis. 558 (1873); Candee v. Western Union Tel. Co., 34 Wis. 471 (1873).

Federal Courts.—Dorgan v. Telegraph Co., (S. D. Ala., Woods, J.) 1 Am. L. T. (N. S.) 406 (1874); Western Union Tel. Co. v. Cook, (Circ. Ct. of App., Ninth Circuit) 61 Fed. Rep. 624. This case arose in California, the Code of which provides that "a carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." The Circuit Court of Appeals, differing from the Supreme Court of California, in a case

already cited, held that the company was precluded by the statute from stipulating for a less degree of care than the statute enjoined.

None of the decisions above cited are influenced by statutes, unless so specified, and all are directly upon the validity of the stipulation in question, unless otherwise explained. It will be seen that the preponderance of authority is by no means with the principal case, but decidedly the other way.

As showing the tendency of decisions in this country upon the stipulation in question, it may be stated that of the courts which came to the question prior to 1870 all but one, Iowa, decided in favor of its validity as against negligence, viz. : Kentucky (see explanation above), Maryland, Massachusetts, Michigan (see explanation above) and Missouri. Of those which came to the question between 1870 and 1880, two, Illinois and Indiana, decided against the stipulation, and two upheld it, New York and Pennsylvania. Of those which have come to the question since 1880, the courts of Alabama, Arkansas, Georgia, Kentucky (overruling the prior case), Kansas, Maine, Minnesota, North Carolina, Ohio, Tennessee, Texas, Utah and Vermont decided against the validity of the stipulation, and those of California, South Dakota and the Supreme Court of the United States in its favor. In the first period the courts stood five to one in favor of the stipulation ; in the second period they were equally divided ; and in the last they stand thirteen to three against the stipulation.

The cases of *Stiles v. Western Union Tel. Co.*, (Arizona) 15 Pac. Rep. 712 (1887), and *Western Union Tel. Co. v. Graham*, 1 Col. 230 (1871), are usually cited as supporting the view that the stipulation in question is void. In the former case the contract is not set forth, but it may be presumed to be identical with that in the principal case. It was found in that case that the damage sued for arose from gross negligence and palpable misconduct on the part of the company's servants, and it was held that nothing in the contract would protect the company from the consequences of such conduct. To same effect is *Western Union Tel. Co. v. Goodbar*, (Miss.) 7 South. Rep. 214 (1890), where the court found gross negligence. In the other case it was held that the stipulation as to unrepeatd messages would not avail the company as against a negligent failure to deliver the message, and the opinion strongly favors the view that the company cannot contract for exemption from negligence in any particular. In *Aiken v. Telegraph Co.*, 5 S. C. 358 (1874), it is impliedly held that the stipulation is not good as against negligence, and in *La Grange v. S. W. Tel. Co.*, 25 La. Ann. 383 (1873), it is held that the stipulation does not affect the vendee.

The two preceding cases and notes should be considered in connection with the present one, the former relating to contracts against liability for negligence generally, and the latter to conditions against liability for negligence in free passes upon railroads.

INTERNATIONAL OCEAN TEL. CO. v. SAUNDERS.

(Supreme Court of Florida, November 28, 1893.)

1. TELEGRAPH COMPANIES. FAILURE TO DELIVER MESSAGE. MENTAL SUFFERING AS AN ELEMENT OF DAMAGES. In an action sounding in tort, but for compensative damages for the breach of a contract by a telegraph company to promptly send or deliver a telegraphic message, mental pain and suffering is not an element of damage, for which a recovery can be had; and where the failure of a telegraph company to promptly send or deliver a telegram according to its contract results in no other damage than mental pain and suffering, the only recovery that can be had would be nominal damages, or at most the price paid for the transmission of the message. Mabry, J., dissenting.

2. RIGHT OF SENDEE TO MAINTAIN ACTION FOR DAMAGES. The person to whom a telegram is sent can maintain an action for whatever legal damage results to him from the negligence of the company in its transmission or delivery, where the message shows that he is interested in it, or that it is for his benefit, or that damage will result to him from such negligence.

John E. Hartridge and Jones & Atkinson, for appellant. *D. L. Gaulden*, for appellee.

TAYLOR, J. The appellee sued the appellant, in case, for its alleged negligence in not promptly delivering to him a telegram transmitted over its line. The plaintiff recovered judgment for \$1,200, and from such judgment the defendant company appeals.

The declaration is as follows:

“The plaintiff, Charles Saunders, by D. L. Gaulden, his attorney, sues the International Ocean Telegraph Company, for that, whereas the defendant, on the 4th day of October, A. D. 1890, was possessed of, and using, and operating a certain telegraph line extending from the city of Jacksonville, Duval county, state of Florida, to the town of Titusville, Brevard county, state of Florida. That said two places are distant from each other about 160 miles, and are connected by direct line of said defendant telegraph company and the Jacksonville, Tampa and Key West railway. That plaintiff's wife, Alice J. Saunders, on the said 4th day of October, 1890, was seized with a mortal malady in the said city of Jacksonville, and that about the hour of seven o'clock on the morning of October 4, 1890, the superintendent of St. Luke's Hospital presented to the defendant the following message, to wit:

“ ‘ Jacksonville, Fla., Oct. 4th, 1890. Charles Saunders, Titusville: Wife dying. Come at once, or send wishes by wire. [Signed] Superintendent St. Luke’s Hospital.’

“ That said message was accepted by the defendant for immediate transmission and delivery to him at Titusville at the full-rate charges or toll, and that through the gross, wanton and reckless negligence of defendant, and in palpable violation of its duty, the message was held by the defendant, and not delivered to him, until about the hour of half-past nine o’clock on the night of the 6th day of October, A. D. 1890. That said message was received at said Titusville office on the morning of the 4th day of October, 1890, at half-past eight o’clock, but was not delivered to him for over sixty hours after the same was received at the Titusville office. That his said wife died in the city of Jacksonville on the 6th day of October, 1890, and hence said message was not delivered to him, or received by him, until ten and a half hours after his said wife’s death. That there was only one train leaving Titusville each day, at the hour of nine o’clock A. M., for the city of Jacksonville, which said train arrived in Jacksonville at the hour of half-past six o’clock P. M. That, had said message been delivered promptly, he could have arrived in Jacksonville on Saturday night, October 4, 1890. That, by reason of this negligence and breach of duty on the part of the defendant, he was prevented from telegraphing to said superintendent his wishes, and was prevented from attending his dying wife, and ministering to her in her last hours, and also from making desired preparations for her interment. That said message was sent by the superintendent of St. Luke’s Hospital, and he paid defendant full rates or toll therefor, to wit, the sum of forty cents, at the Titusville office, and as said defendant failed to deliver said message promptly, and notified the said superintendent of St. Luke’s Hospital that said message had not been delivered, and collected the sum of forty cents charges on said message, which said forty cents was charged to plaintiff by said superintendent, and which he had to pay, thereby entailing a loss of forty cents on this plaintiff. By reason of which said defaults, wrong and negligence on the said defendant’s part, plaintiff incurred a loss and damage of the said forty cents paid as aforesaid on account of the charges made and collected from said superintendent of St. Luke’s Hospital,

which plaintiff had to pay as a legitimate charge against him. And, besides this, the plaintiff suffered great damage by reason of said wrong and injury so done by the defendant to his affections and feelings; and the plaintiff then and there suffered great damage, in anguish and pain of mind, by reason of the said negligence and wrong so done him by defendant. That while his said wife was dying she was deprived of that care, attention, consideration and consolation which she would have received but for said negligence of said defendant in failing to deliver said message promptly as aforesaid, and that by reason thereof he was damaged, in that he suffered great mortification, anguish and pain of mind and injury to his feelings and affections, in not being able to be with his said wife in her dying hours, and in not being able to make preparations for his wife's funeral and interment, all of which damaged plaintiff in the sum of \$1,995," etc.

At plaintiff's request the following instruction was given to the jury: "If, from the evidence, you believe that the superintendent of St. Luke's Hospital sent the following message to the plaintiff: 'Wife dying. Come at once, or send wishes by wire'—and said message was accepted by the defendant for transmission, and the toll or charges on same was paid to defendant, and this message was negligently delayed in delivery by defendant company, whereby plaintiff, Saunders, was prevented from attending his dying wife, and from making desired preparations for her funeral, the plaintiff, Saunders, would be entitled to recover for the wrong and injury done his feelings, and for the mental anguish and pain of mind suffered by him; and in making up your verdict you must take into consideration all the testimony, and fix his damages, if any, at such amount as you think, from the evidence, is just, reasonable, proper and fair." To this charge exception was taken, and the error assigned thereon presents the real issue involved in the cause: Can an action be sustained, and can damages be admeasured, for the breach of a contract that results in mental suffering alone, without any accompanying physical injury or suffering, and without any concomitant damage to the person, character, reputation or property?

The Supreme Court of Texas, in *So Relle v. Telegraph Co.* (decided in 1881), 55 Tex. 308, a case in which the telegraph company negligently failed to promptly deliver a telegram informing

plaintiff of the death of his mother, and summoning him to meet a conveyance at a certain point that night that would carry him to where the remains of his mother were, in time to attend the funeral, first led off with an affirmative answer to the question. The court in that case asserts that it is the settled rule of law in that state that injury to the feelings, caused by the willful neglect or fault of another, constitutes such actual damages for which a recovery may be had, and cites as authority for such assertion the cases of *Hayes v. Railroad Co.*, 46 Tex. 279, and *Railroad Co. v. Randall*, 50 Tex. 261. In neither of these cases is the doctrine either settled or asserted that injury to the feelings, or mental suffering, alone, can be made the subject of a suit for compensative damages. The Case of *Hayes*, *supra*, was against a railroad company for damages for wrongfully and forcibly ejecting the plaintiff from its passenger train in the presence of his wife and family, in which it was claimed that the ejectment was done in a rude and insulting manner, and by personal violence, resulting in injuries to plaintiff's clothing and bruises to his person. Exemplary or punitive damages were claimed and the jury were instructed to estimate the actual damages by the "injuries sustained by the plaintiff in his person, his estate and his feelings," and it was held that by this charge the subject of the amount of actual damages was fairly placed before the jury. But nowhere is it asserted that mental suffering alone can be made an independent basis for admeasuring damages. The case, like many others founded on tort that might be cited, simply holds that mental suffering or injured feelings may be taken into consideration as an element of damage, when coupled with or accompanied by substantive injury to the person or estate, upon the ground, as stated in the authorities, that in such cases the mental suffering growing out of and produced by the physical injury is so interwoven with the latter that it is impossible to consider the one without contemplating the other. *City of Salina v. Trosper*, 27 Kans. 544; *Mulford v. Clewell*, 21 Ohio St. 191; *Canning v. Williamstown*, 1 Cush. 451; *Railroad Co. v. Stables*, 62 Ill. 313; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Kennon v. Gilmer*, 131 U. S. 22; 9 Sup. Ct. Rep. 696; *Trigg v. Railroad Co.*, 74 Mo. 147. The same may be said of the Case of *Randall*, *supra*. In that case the plaintiff, a brakeman on the defendant's trains,

sued the company for damages for its negligence in having an open ditch across its track, into which he fell while performing the duty of coupling two of defendant's cars, and whereby his arm was run over and crushed by the cars, necessitating its amputation. In that case, too, the doctrine is sanctioned that an element of the verdict may be compensation for the mental and physical suffering caused by the injury. But nowhere is the doctrine sanctioned that mental suffering alone can sustain an action. For the support of its ruling in the *So Relle* case the Texas court next quotes at length the dictum of the authors of *Shearman & Redfield on Negligence*, which dictum, as originally incorporated in their work, was entirely without the support of any adjudged case. The seduction case of *Phillips v. Hoyle*, 4 Gray, 568, is next invoked to the support of the Texas court, where injury to the feelings of the parent in consequence of the daughter's seduction was held to be an element of damages. The fact seems to have been overlooked, in citing this case to its support, that in cases of seduction, and other torts independent of contract, injured feelings are given consideration, not so much as a criterion for the admeasurement of compensation, but as a standard by which to estimate the enormity of the outrage willfully committed, and as a guide whether the damages to be allowed as punishment shall be higher or lower. The next and last authority cited to the support of the *So Relle* case is the case of *Roberts v. Graham*, 6 Wall. 578; but we fail to find in it any reference whatever to the subject of damages for injured feelings or mental suffering, the whole case being confined to a discussion of the question of the sufficiency of the allegations of a declaration or complaint for general damages as a predicate for the introduction of proof of special damage. The doctrine of the *So Relle* case has for its support, then, in reality, only the unsupported dictum of Messrs. *Shearman & Redfield* in their work on *Negligence*.

In the case of *Railway Co. v. Levy*, 59 Tex. 563 (decided in 1883), the *So Relle* case was expressly overruled, in so far as it held that an action for mental suffering alone could be maintained. In *Stuart v. Telegraph Co.* (decided in 1886), 66 Tex. 580; 18 S. W. Rep. 351, the *Levy Case*, *supra*, is practically overruled; and the court, without the support of any additional authorities,

returns to the doctrine of the *So Relle* case. The ruling in *Stuart v. Telegraph Co.* has been adhered to in that state ever since, incumbered, however, with finely-drawn distinctions that seem to keep an even pace with the rapid increase of litigation that the enunciation of such a doctrine would naturally engender. *Telegraph Co. v. Cooper*, 71 Tex. 507; 9 S. W. Rep. 598; *Telegraph Co. v. Broesche*, 72 Tex. 654; 10 S. W. Rep. 734; *Telegraph Co. v. Simpson*, 73 Tex. 422; 11 S. W. Rep. 385; *Telegraph Co. v. Feegles*, 75 Tex. 537; 12 S. W. Rep. 860. In *Beasley v. Telegraph Co.*, 39 Fed. Rep. 181, in the Circuit Court of the United States for the western district of Texas, the same doctrine is announced upon the authority alone of the holdings of the Supreme Court of that state.

The Supreme Court of Tennessee, in *Wadsworth v. Telegraph Co.*, 86 Tenn. 695; 8 S. W. Rep. 574, by a divided court, next follow the Texas doctrine, citing only the dictum of *Shearman & Redfield* in addition to the Texas cases. The dissenting opinion of Judge Lurton in that case is unusually forceful and clear, and, according to our view, states the true rule in an argument that is unanswerable.

The Supreme Court of Indiana, in *Reese v. Telegraph Co.*, 123 Ind. 294; 24 N. E. Rep. 163, next follows the Texas doctrine, citing only the cases from that state, with the additional case from Tennessee.

The Supreme Court of Kentucky, in *Chapman v. Telegraph Co.*, 13 S. W. Rep. 880, next cite and follow the Texas and Tennessee cases.

The Supreme Court of North Carolina, in *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. Rep. 1044, next cite and follow the Texas cases, citing to its support also the cases from Tennessee, Kentucky and Indiana, that, it will be remembered, are predicated upon the Texas cases.

In *Stuart v. Telegraph Co.*, *supra*, the liability of telegraph companies to damages for mental suffering caused by their failure to transmit or deliver telegrams is put expressly and pointedly upon the ground that the mental suffering produced by the company's breach of its contract was within the contemplation of the company, at the time it made the contract, as the result that would naturally follow a breach of it.

Would the Texas court award damages to one individual for the poignant mental sting resulting from being willfully, publicly and deliberately taunted on the street by an irate enemy with the insult that he was a cowardly cur, simply because the mortification and wounded feelings that would surely follow were within the contemplation of the insulter? We apprehend not, and yet in the latter case the deliberate purpose of the insulter would be to produce such mental anguish. To draw the comparison closer still: An individual borrows his neighbor's money, agreeing to pay at a given day, knowing in advance that his default then will surely result in the mind-harrowing tortures to his accommodating friend of utter financial ruin—a species of suffering that, unfortunately, to many, is far more acute than any connected with the ties of kinship. Could damages be allowed in that case for the mental torture simply because the borrowing friend contemplated and knew that it would follow as the result of a breach of his contract to pay? Certainly not, and yet such is the effect of the doctrine announced in the Stuart case, when followed to its logical result. Suppose a mother, whose child is critically ill, contracts with her neighbor, at a stipulated price paid in advance, to summon her husband, temporarily absent some distance away, and the neighbor delays complying with his contract until after the death and burial of the child. Would damages be awarded against him to compensate the parents for the mental anguish suffered by them in consequence of the absence of the husband under such circumstances? We apprehend not. And, if not in the case of the violated contract between individuals, where is the reason for applying a different rule where one of the contracting parties is a telegraph company? In all these cases, taking them up seriatim, in the order in which they were rendered, there is a conspicuous absence of anything like a logical reason upon which to base the newly announced doctrine of allowing compensative damages for injured feelings alone. They simply follow each other without the addition of any new light, or other attempt at reason for the thing, than is contained in the parent Texas case. None of them undertake to invent any crucible in which mental pain can, with anything like judicial accuracy, be converted into compensative dollars; but all of them are plethoric with argument admirably

suited to cases that call for the infliction of punishment, with none to guide us to the door for just compensation. Yet, as a matter of course, none of them pretend to ground the right of recovery upon the idea that the infliction of punitive or exemplary damages is permissible in such cases.

It should not be lost sight of, in considering this class of cases, that, although the action, as in the present case, is in form *ex delicto*, its foundation is a contract, and that, in substance, it is an action *ex contractu* for compensatory damages for the breach of such contract, "tort" being defined to be "a wrong independent of contract." *Add. Cont.* (7th ed.) 1. We should keep closely in mind, also, that in actions sounding in tort, but growing out of contracts, with the single exception of the breach of a contract to marry, that in this respect is *sui generis*, exemplary or punitive damages are never permitted, but only the actual damage resulting from the breach. *Field Dam.* § 94; 3 *Pars. Cont.* 180; *Lawson Cont.* § 463. With these principles in mind, and in view of the utter impossibility of either proving or affixing a monetary valuation upon mental suffering, it seems apparent that, in order to sustain the money award therefor, we must do so, necessarily, without proof, and are driven to the necessity of confessing that a jury, in awarding it, cannot be governed by any other guide or check than that dictated by whim or arbitrary caprice — the same latitudinous and uncertain field in which they are left when dealing with a case calling for punishment, instead of compensation.

In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Wensleydale says: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone, though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." In *Blake v. Railway Co.*, 10 Eng. Law & Eq. 437, where a widow sued for the death of her husband, under the statute of 9 and 10 Victoria, chapter 93, allowing damages in such cases, Lord Coleridge says: "The jury, in assessing the damages, are confined to injuries of which a pecuniary estimate can be made, and cannot take into their consideration the mental suffering occasioned to the survivors by his death." *Wyman v. Leavitt*, 71 Maine, 227; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Webb & Railway Co.*, (Utah) 24 Pac. Rep. 616.

In *Tribune Co. v. McArthur*, 16 Mich. 447, a libel case, in which Chief Justice Cooley concurred, Judge Campbell, delivering the opinion of the court, says: "The injury to the feelings is only allowed to be considered in those torts which consist of some voluntary act, or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances." From these authorities it seems to have been the settled rule of law, prior to the doctrine applied by the Texas courts to the breach of contracts by telegraph companies for the transmission or delivery of telegraphic communications relating to domestic affairs, that mental suffering was never allowed to be considered as an element of damages for which pecuniary compensation could be awarded, except (1) in cases of torts, where there was some physical injury and bodily suffering, in which cases, whether there were any circumstances justifying exemplary damages or not, the mental suffering incident to, connected with and flowing directly from the physical injury was permitted to be considered in connection with the physical pain, both taken together, but not the one disconnected from the other; and (2) in cases founded purely in tort, where the negligence was so gross as to reasonably imply malice, or where, from the entire want of care or attention to duty, or great indifference to the persons, property or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages; and (3) in cases growing out of contract, in the one exceptional case of the breach of a contract to marry. It is impossible for us to conceive of a case where compensation only, in its strictest sense, for the breach of a contract, is sought for, and in which the only element of injury is temporal mental pain, how any award for such mental suffering can be sustained on the theory of compensation, without violating the fundamental principles of the law in the administration of civil redress. One of these principles is that verdicts awarding pecuniary compensation, strictly speaking, must be supported by competent proofs. Can the extent or moneyed value of mental anguish be established, even approximately, by any known method of legal proofs? If not, then the verdict assigning to it a value in dollars and cents cannot stand, because of the want of proof to sustain it. Because of this, as it seems to us, insurmountable difficulty, we cannot agree with the Texas and other courts

that have followed her in sustaining pecuniary awards for mental suffering that are wholly unsupported by any recognized legal proofs. In this view of the law we are fully sustained by the able opinion of Judge Cooper in *Telegraph Co. v. Rogers*, 68 Miss. 748; 9 South. Rep. 823, in which the authorities are exhaustively reviewed and tersely criticised, and by the following cases: *Burnett v. Telegraph Co.*, 39 Mo. App. 599; *Russell v. Telegraph Co.*, 3 Dak. 315; 19 N. W. Rep. 408; *West v. Telegraph Co.*, 39 Kans. 93; 17 Pac. Rep. 807; *Chase v. Telegraph Co.*, 44 Fed. Rep. 554; *Crawson v. Telegraph Co.*, 47 Fed. Rep. 544; *Owen v. Henman*, 1 Watts & S. 548. See, also, the exhaustive opinion by Justice Lumpkin of the Supreme Court of Georgia, rendered in March, 1892, in *Chapman v. Telegraph Co.*, 88 Ga. 763; 15 S. E. Rep. 901.

In the case under consideration, the plaintiff's suit, though sounding in tort, is for compensation only for the breach by the defendant telegraph company of its contract promptly to deliver a telegram summoning him to the death bed of his wife. His only injury, resulting directly from such breach of contract, was mental suffering and disappointment in not being able to attend upon his wife in her last moments, and to be present at her funeral. The resultant injury is one that soars so exclusively within the realms of spirit land that it is beyond the reach of the courts to deal with, or to compensate by any of the known standards of value. It presents a class of cases where legislative action fixing some standard of recovery would be highly appropriate; but until this action is taken, we do not feel that the courts are authorized to so widely diverge from the circumscribed limits of judicial action as to undertake to mete out compensation in money for the spiritually intangible. Under these circumstances, we do not think that the plaintiff was entitled to any other than nominal damages, or, at most, the cost of the message whose delivery was delayed. The charge of the court that was excepted to was erroneous. This disposes of the main question involved. Upon the other question presented, as to whether the person to whom a telegram, like the one involved herein, is sent, can maintain an action for any legal damage that may result to him from the negligence of the company in its transmission or delivery, we are of the opinion that he can, where the message shows that he is inter-

ested in it, or that it is for his benefit, or that damage will result to him from its negligent transmission or delivery. Gray Com. Tel. § 65, and citations; Thomp. Elec. §§ 426, 428, et seq., and citations.

The judgment of the court below is reversed, and a new trial ordered.

MABRY, J. (dissenting). The opinion of the majority of the court adopts the view that the person to whom a telegraphic message is sent, like the one in the case before us, can maintain an action for any legal damage that may directly result to him by reason of the violation of duty on the part of the company to send or deliver the message, where it appears that the party is interested in it, or is so connected with it as to be damaged on account of said neglect of duty. The obstacle thrown in the path of the plaintiff's recovery in the present case relates to the damage for mental injury alleged to have been suffered on account of the company's neglect of duty in seasonably delivering the message sent. The message, for a failure to deliver which suit was brought, is perfectly plain, and there is no obscurity about its meaning. It is a summons of an absent husband to his dying wife, and there is no question about the company's receipt of the usual toll for transmitting the message, and its undertaking to transmit the same. The plaintiff, according to his showing, sent his sick wife from Titusville to St. Luke's Hospital in Jacksonville, where he had made arrangements for her to go and be treated. Titusville is in reach of Jacksonville by a half day's public travel. At the time plaintiff's wife left Titusville for Jacksonville, he wired the hospital that she would arrive at a certain time, and informed the company's operator at Titusville of the wife's condition, and told him that, as he (plaintiff) expected to have business with the company, if any messages came for him he would be working in Titusville, and boarding at the Lund House. The company introduced testimony tending to show that its messenger boy, after the message was received, hunted for plaintiff in Titusville, and could not find him, and was told by parties that plaintiff had left town. Plaintiff remained in Titusville, however, and worked on a building being erected not far from the telegraph office; and there is no contradiction of plain-

tiff's testimony about the information he gave to the company's operator, above mentioned. On the morning of the fourth of October a message was sent over the company's line, and received at the Titusville office, for the plaintiff, in the following words: "Wife dying, come at once, or send wishes by wire." This message was not then delivered, but on going to the telegraph office, after dark, on the sixth day of that month, plaintiff was handed the message, after his wife was dead, and had been placed in the hands of the undertaker for interment. If the message had been seasonably delivered, the plaintiff could easily have been with his wife some time before her death, and could have arranged for her burial. The cost of transmitting the message was charged to plaintiff, and he paid it.

If the jury believed plaintiff's testimony, the inexcusable violation of duty on the part of the company not only caused plaintiff the useless expenditure of the cost of transmitting the message, but inflicted upon him, directly, great mental anguish and injury, as he testifies. The majority opinion holds, in effect, that there is no law in force in Florida to authorize the plaintiff to recover damages for mental pain and injury in such a case. Telegraphy is an American invention, of comparatively recent date, long after the establishment of the common-law rules which have come to us from former ages; and I think the application of legal rules to telegraph companies, as shown by the preponderance of judicial thought in this country, should influence us in determining here, for the first time, whether or not there is any law for redressing such an admitted violation of public duty. It cannot be successfully denied that a decided majority of the American state courts have held the company liable in such cases. The opinion of the majority of the court in the present case shows the decisions in Texas, Tennessee, Indiana, Kentucky and North Carolina have held such to be the law, independent of any statutory regulation; and the decision in *Telegraph Co. v. Henderson*, 89 Ala. 510; 7 South. Rep. 419, should be added. I do not understand that the opinion of the majority of the court claims for its support a majority of the decisions, numerically, and it expressly plants itself upon the dissenting opinion in the Tennessee case. I think Judge Lurton's opinion in that case is the ablest I have seen on that side of the question, and if I could

get my consent to follow, in such cases, the minority decisions, I would adopt that one as the best.

The decisions cited from Mississippi, Georgia, Dakota and Kansas support the main opinion. The one from Missouri was for the recovery of a statutory penalty of \$100 for the neglect of the company to transmit a message from a husband away from home to his wife, informing her that he would be at home the night of the day it should have been sent. The recovery was sustained, and in the opinion reference is made to the decisions holding that the substantive damages for mental pain disconnected with physical injury could not be recovered, with the suggestion that the knowledge of such rule may have induced the legislature of Missouri to enact the statute under which the recovery was had.

It seems to be contended in the minority decisions that the rule enforcing liability for mental injury in such cases had its origin in the statement of the law by text-writers. The Mississippi case says: "It is upon the suggestions of text-writers, supported by authorities which have been given a strained construction, and upon a misapplication of the rule that damages for breach of contract are commensurate with the injury contemplated by the parties, that some courts, in recent years, have decided that mental pain and anguish, disconnected from physical injury, furnish a substantive cause of action, for which recovery may be had." Shearman & Redfield are the offending initiatory text-writers, in declaring in favor of the rule allowing damages in such cases (vol. 2, § 756), and a liberal share of criticism has been bestowed upon them for so doing. Vide, also, the text in *Thomp. Elec.* § 379. It will be apparent, however, upon a fair reading of all that has been decided on this subject in this country — the birthplace of telegraphy — that the majority opinion is in favor of a different rule from that adopted by the opinion of the majority of the court in the case before us; and, as I do not think the reasons for departing from the prevailing view are sufficient, I cannot consent to do so.

There can be no question but that the failure of the telegraph company to send or deliver a message can directly cause substantive damage and injury to the mind. The injury to the feelings inflicted directly by the company's violation of duty may be

greater than pecuniary loss to the pocket or to the reputation of a person. Mr. Wharton says in his book on Negligence (§ 768): "A telegraphic company, wielding a power for good or evil only transcended by railway corporations, is eminently within the scope of the rule, 'Sic utere tuo ut non alienum laedas.' If it undertakes to exercise so tremendous a franchise, it must do so in a way which may not injure others." In 3 Sutherland Damages, 314, it is stated that "in England the only duty of a telegraph company is that arising out of contract, and, therefore, only the sender, or party making the contract, has a right of action. * * * In this country, however, a different doctrine prevails. The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver." In the Georgia case, cited in the majority opinion and specially approved, the learned judge uses this language in his opinion: "But it is urged that the public occupation of telegraph companies creates between them and the public a special relation, in which their responsibility is greater than that of other persons. So much of their business and profit is derived from the acceptance of messages involving feelings only, that at first view it would seem legitimate and salutary to require them to answer in damages for any dereliction of duty in this important part of their activity. The argument is that, in the exercise of a public employment, they undertake for hire to serve the feelings of their customers, and, therefore, ought to pay for negligent non-performance or mis-performance of this peculiar function. This reasoning is unanswerable, in so far as it proves a right of action to arise out of the breach of duty." There is here no confusing and misleading reference to the liabilities of individuals and corporations, but a just concession of legal duty imposed by the relation of a public trust and station. Where a corporation is created, with the right and power to transmit telegraphic messages for compensation, and it engages in such employment, and undertakes to send such messages, it is under a duty to the public to perform its undertakings, and a failure to do so is a clear violation of public duty. The authority cited recognizes such a duty, and the law on this point is clear. The Georgia court, however, found for it an insuperable difficulty, as I understand the decision, in sustaining the action, on account of the admeasurement of the

damages. That is a serious difficulty in the majority opinion here. It goes too much into the realm of psychology, and there is no reliable way of ascertaining the injury to such an intangible and spiritual thing as the mind. That damages have been and are constantly being awarded, in many cases, for pain and anguish of mind, is admitted; but it is said that such damages are allowed only where some physical injury has been inflicted, and the mental injury is so connected therewith as not to be severable therefrom. Would not the same argument used in behalf of the telegraph companies exclude any inquiry into mental pain in all cases? Does not the same uncertainty as to ascertainment of the injury exist as much in the one case as in the other? The liability of the company can rest upon a safe and sure ground without going into the field of speculation, and I think the majority of the decisions imposing such liability are right.

A telegraph company is under a public duty, by reason of its public station and employment, to transmit and deliver a plain, decent telegram, like the one in this case; and when the company accepts the usual toll, and undertakes to send and deliver the message, a contractual obligation exists between the company and the sender, or the party in interest, as the case may be. The contract may be waived, and suit brought in case for tort for breach of the public duty, the contract serving only the purpose of showing the relation of duty or obligation between the parties. This is the way the plaintiff sued in the case before us. That this can be done is beyond question. *Rich v. Railroad Co.*, 87 N. Y. 382. In actions of tort the plaintiff has a right to recover such damages as result proximately and naturally from the wrongful act of the defendant. The company is under a public duty to do a certain specific thing; that is, in the case here, to transmit and deliver a message informing the husband that his wife was dying. The husband had a right to rely upon the company to perform this duty, as it had invited such confidence. On a violation of this duty, the company should be held liable for the damages that result proximately and naturally therefrom. As was said in one of the decisions cited in the main opinion: "If a telegraph company undertakes to send a message, and fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has

violated its contract, and whenever a party does so he is liable, at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damages arising therefrom." In the Alabama case it was held, that when the plaintiff is entitled to recover for the cost of the telegram, he may also recover for mental pain and injury resulting directly from the violation of duty on the part of the company. "In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this; not more obviously the consequence of the wrong done than in this." That a rule for recovery against the company in such cases should exist, is acknowledged by all. I find such a rule already established by a majority of the decisions made by eminent judges and courts of high standing in this country, and I am in favor of following them. They are on the side of right and justice.*

Telegraph companies — mental anguish as an element of damages. — The doctrine that there may be a recovery for mental anguish, for negligence in sending or delivering telegraphic messages, in the absence of other injury, is rapidly losing ground. The following decisions are against the right of recovery in such cases:

Dakota Territory.— Russell v. Telegraph Co., 3 Dak. 315; 19 N. W. Rep. 408.

Florida.— International Ocean Tel. Co. v. Saunders, the principal case (1893).

Georgia.— Chapman v. Western Union Tel. Co., 88 Ga. 763; 6 Am. R. R. & Corp. Rep. 480 (1892).

Kansas.— West v. Telegraph Co., 39 Kans. 93; 17 Pac. Rep. 807.

Minnesota.— Francis v. Western Union Tel. Co., 59 N. W. Rep. 1078 (July 17, 1894).

Mississippi.— Western Union Tel. Co. v. Rogers, 68 Miss. 748; 9 South. Rep. 823 (1891).

Missouri.— Connell v. Western Union Tel. Co., 116 Mo. 34; 22 S. W. Rep. 345 (1893); Burnett v. Telegraph Co., 39 Mo. App. 529.

Wisconsin.— Summerfield v. Western Union Tel. Co., 57 N. W. Rep. 973 (1894). As the latter case is one of the most recent, we quote from it as follows: "The reasoning in favor of the recovery of such damages is, in brief,

* Reported in 14 South. Rep. 148.

that a wrong has been committed by defendant which has resulted in injury to the plaintiff as grievous as any bodily injury could be, and that the plaintiff should have a remedy therefor. On the other hand, the argument is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy and easily simulated, and the new field of litigation thus opened up so vast, that the courts should not establish such a rule. Regarding, as we do, the Texas rule as a clear innovation upon the law as it previously existed, we shall decline to follow it, and shall adopt the other view, namely, that for mental distress alone, in such a case as the present, damages are not recoverable. The subject has been so fully and ably discussed in opinions very recently delivered that no very extended discussion will be attempted here. We refer specially to the opinions in *Telegraph Co. v. Rogers*, (Miss.) 9 South. Rep. 823; *Connell v. Telegraph Co.*, (Mo. Sup.) 22 S. W. Rep. 345; *Telegraph Co. v. Wood*, 57 Fed. Rep. 471. See, also, Judge Lurton's dissenting opinion in *Wadsworth v. Telegraph Co.*, 86 Tenn. 695; 8 S. W. Rep. 574. In the last-named opinion the following very apt remarks are made: 'The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely on physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character.'

"Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such a rule of damages. If a jury must measure the mental suffering occasioned by the failure to deliver this telegram, must they not also measure the vexation and grief arising from a failure to receive an invitation to a ball or a Thanksgiving dinner? Must not the mortification and chagrin caused by the public use of opprobrious language be assuaged by money damages? Must not every wrongful act which causes pain or grief or vexation to another be measured in dollars and cents? Surely, a court should be slow to open so vast a field as this without cogent and overpowering reasons. For ourselves, we see no such reasons. We adopt the language of Gantt, P. J., in *Connell v. Telegraph Co.*, supra: 'We prefer to travel yet awhile *super antiquas vias*. If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case.'"

It was also held in the same case that such damages were not recoverable under a statute providing that telegraph companies should be "liable for all damages occasioned by failure or negligence of their operators, servants or employees in receiving, copying, transmitting or delivering dispatches or mes-

sages." Cassoday, J., dissented upon this last point, though agreeing with the majority otherwise.

Federal Courts.—Many recent cases in the federal courts support the decision in the principal case. *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554; *Tyler v. Western Union Tel. Co.*, 54 Fed. Rep. 634; *Kester v. Western Union Tel. Co.*, 55 Fed. Rep. 603; *Western Union Tel. Co. v. Wood*, 6 C. C. A. 432; 57 Fed. Rep. 471; *Gahan v. Western Union Tel. Co.*, 59 Fed. Rep. 433. To the same effect is *Wilcox v. Richmond & D. R. Co.* 3 C. C. A. 73; 52 Fed. Rep. 264, where it was held that, in an action against a railroad company for breach of contract for a special train, damages cannot be recovered merely for disappointment and mental suffering resulting from delay in departing to reach the bedside of a sick parent.

In *Western Union Tel. Co. v. Wood*, 6 C. C. A. 432; 57 Fed. Rep. 471, it is said: "The general rule that mental anguish and suffering, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of the general law prior to the *So Relle Case*, 55 Tex. 308 (in 1881), and by the uniform decision of the federal courts, and decisions of the supreme courts of Nevada, Dakota, Kansas, Maine, Mississippi, Georgia, Massachusetts, and by the opinions of several text-writers of unquestioned standing as expounders of the law;" and the following authorities are cited in addition to those above given: *Lynch v. Knight*, 9 H. L. Cas. 577; *Flemington v. Smithers*, 2 Car. & P. 292; *Railway Co. v. Coultas*, 13 App. Cas. 222; *Johnson v. Wells*, 6 Nev. 224; *Salina v. Trosper*, 27 Kans. 564; *Wyman v. Leavitt*, 71 Maine, 227; *Crawson v. Telegraph Co.*, 47 Fed. Rep. 544; *Canning v. Williamstown*, 1 Cush. 451; *Wood's Maine Dam.* p. 74, note; *Wood Ry. Law*, p. 1238; 5 Am. & Eng. Ency. of Law, p. 42, note 2; *Pierce R. R.* 302; *Railroad Co. v. Stables*, 62 Ill. 320; *City of Chicago v. McLean*, 133 Ill. 148; 24 N. E. Rep. 527; *Trigg v. Railroad Co.*, 74 Mo. 147; *Walsh v. Railroad Co.*, 42 Wis. 23; *Kennon v. Gilmer*, 131 U. S. 22; 9 Sup. Ct. Rep. 696; *Terwilliger v. Wands*, 17 N. Y. 54; *Railroad Co. v. Packer*, 9 Bush. 455; *Joch v. Dunkwardt*, 85 Ill. 331; *Paine v. Railroad Co.*, 45 Iowa, 570; *Railroad Co. v. Stevens*, 9 Heisk. 12; *Mulford v. Clewell*, 21 Ohio St. 191; *Freese v. Tripp*, 70 Ill. 497; *Clinton v. Laning*, 61 Mich. 355; 28 N. W. Rep. 125; *Meidel v. Anthiss*, 74 Ill. 241; *Masters v. Warren*, 27 Conn. 293; *Stewart v. Ripon*, 38 Wis. 584.

The cases in favor of the right to recover for mental anguish are the following:

Alabama.—*Western Union Tel. Co. v. Henderson*, 89 Ala. 510 (1890); 7 South. Rep. 419; *Western Union Tel. Co. v. Cunningham*, 14 South. Rep. 579 (1893).

Indiana.—*Reese v. Western Union Tel. Co.*, 123 Ind. 294; 24 N. E. Rep. 163 (1890); *Telegraph Co. v. New House*, (Ind. App.) 33 N. E. Rep. 800; *Telegraph Co. v. Eskridge*, (Ind. App.) 33 N. E. Rep. 238; *Telegraph Co. v. Stratemeier*, (Ind. App.) 32 N. E. Rep. 871; *Telegraph Co. v. Cline*, (Ind. App.) 35 N. E. Rep. 564.

Kentucky.—*Chapman v. Western Union Tel. Co.*, 90 Ky. 265; 3 Am. R. R. & Corp. Rep. 193 (1890).

North Carolina.—Young v. Western Union Tel. Co., 107 N. C. 370; 3 Am. R. R. & Corp. Rep. 493 (1890); Thompson v. Western Union Tel. Co., 107 N. C. 449; 12 S. E. Rep. 427 (1890).

Tennessee.—Wadsworth v. Telegraph Co., 86 Tenn. 695; 8 S. W. Rep. 574.

Texas.—In addition to the Texas cases cited in note, 3 Am. R. R. & Corp. Rep. 506, we refer to the following of more recent date: Gulf, etc., R. Co. v. Richardson, 79 Tex. 649; 15 S. W. Rep. 689 (1891); Western Union Tel. Co. v. Rosentreter, 80 Tex. 406; 16 S. W. Rep. 25 (1891); Erie Telegraph & Telephone Co. v. Grimes, 82 Tex. 89; 17 S. E. Rep. 831 (1891); Western Union Tel. Co. v. Lydon, 82 Tex. 364; 18 S. W. Rep. 701 (1891); Western Union Tel. Co. v. Nations, 82 Tex. 539; 18 S. W. Rep. 709 (1891); Potts v. Western Union Tel. Co., 82 Tex. 545; 18 S. W. Rep. 604 (1891); Western Union Tel. Co. v. Houghton, 82 Tex. 561; 17 S. W. Rep. 846 (1891); Western Union Tel. Co. v. Beringer, 84 Tex. 38; 19 S. W. Rep. 336 (1892). The following are recent cases to the same effect in the Court of Civil Appeals: Western Union Tel. Co. v. Evans, 23 S. W. Rep. 998 (1893); Western Union Tel. Co. v. Neel, 25 S. W. Rep. 661 (1894); Western Union Tel. Co. v. Proctor, 25 S. W. Rep. 811 (1894); Western Union Tel. Co. v. Jobe, 25 S. W. Rep. 1036 (1894).

In the recent case of Gulf, C. & S. F. R. Co. v. Trott, 25 S. W. Rep. 419, decided by the Supreme Court of Texas February 19, 1894, the Court of Civil Appeals made a submission in the following language: "In the above-styled and numbered cause now pending in our court, the appellee claimed and recovered damages in the County Court for alleged negligence on part of appellant company, whereby appellee's team of horses, hitched to a wagon in which he was traveling, were frightened, and caused to break his wagon, and put him in fear and fright as to his own personal safety, and caused him great mental suffering, vexation and anxiety of mind. There was evidence tending to support all of these allegations. There was no averment or proof of any physical injury to appellee. The court instructed the jury that if they found for appellee, and found that, as the result of the negligence complained of, he was frightened, put in fear for his personal safety, and caused mental pain or anxiety, they should allow him fair and reasonable compensation therefor. The evidence did not present any issue as to exemplary damages, and the jury were so instructed. With this explanation, this court certified to the Supreme Court for decision the following questions: (1) In an action for damages, based upon tortious and negligent conduct of a defendant, where the wrongful act causes damages to plaintiff's property, but no physical injury to plaintiff, is mental suffering an element of actual damages? (2) Can actual damages be recovered for mental suffering, where there is no physical injury, no injury to property, nor other element of actual damages?" The Supreme Court answered these questions in the negative, adopting the reasoning to be found in *Railway Comrs. v. Coultas*, 18 App. Cas. 222; *Sneesby v. Railway Co.*, 1 Q. B. D. 42, and *Ewing v. Railway Co.*, 147 Penn. St. 40; 23 Atl. Rep. 340, and relying also upon the following: *Wyman v. Leavitt*, 71 Maine, 227; *Railroad Co. v. McGinnis*, 46 Kans. 109; 26 Pac. Rep. 453; *Canning v. Williamstown*, 1 Cush. 451; *Johnson v. Wells*, 6 Nev. 224; *Railway Co. v. Stables*, 62 Ill. 313; *Lynch v. Knight*, 9 H. L. Cas. 577; *Joch v. Dunkwardt*, 85 Ill. 331.

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interest in excess of the rate allowed by state laws. 229 note 3.

43. The courts of record of the state have jurisdiction in actions brought under sections 5197 and 5198 of the Revised Statutes of the United States to recover from national banks the penalty for knowingly taking, receiving, reserving or charging a greater rate of interest than is allowed by law. 229 note 3.

44. A loan made by a national bank to an association or person of a greater amount or proportion than is permitted by law does not render the security taken for such loan void. 230 note 5.

45. Revised Statutes United States, which forbid national banks to make loans on the security of shares of their own capital stock, does not invalidate such a loan, since only the government can take advantage of the breach of the law. 230 note 5.

46. A corporation which holds certain shares of stock in a national bank as collateral security for a loan, and is carried on the registry of the bank as the holder of such stock "as pledgee," is not subject, on the bank's insolvency, to the statutory liability of a stockholder. 230 note 6.

47. Married women who are permitted by the laws of the state in which they reside to become shareholders in national banks, are liable to assessments thereon under the national banking laws. 230 note 6.

48. Creditors of an insolvent national bank cannot be required, in proving their claims, to allow credit for any collections made after the date of the declared insolvency, from collateral securities held by them. 231 note 9.

49. Preferences in case of insolvency. 231 note 7.

50. Set-off in case of insolvency. 231 note 8.

51. An assessment of the entire capital stock of a national bank "in solido" against the bank is invalid. 232 note 10.

52. Mandamus to compel officers of bank to exhibit list of shareholders. 233 note 10.

53. Meaning of the phrase "other moneyed capital" in United States statute. 232 note 10.

54. Criminal offenses under National Banking Act. 233 note 11.

BILL OF LADING.

See CARRIERS, 2, 3.

BLASTING.

See RAILROADS, 49-52.

BUILDING AND LOAN ASSOCIATIONS.

1. Where the premium and interest for a loan together amount to more than the lawful rate of interest, the loan is usurious. 549.

2. The dealings of building and loan associations with their own stockholders differ from ordinary loan transactions to such an extent as to warrant the legislature in excepting such associations, as to such dealings, from the operation of the provisions of the General Usury Law. 554 note 4.

3. An Illinois stockholder in a foreign homestead loan association doing business in Illinois may withdraw his stock on thirty days' notice according to Illinois statute, regardless of the provisions of his stock certificate. 553 note 2.

4. A shareholder in a building and loan association, whose officers have so mismanaged its affairs that its assets amount to less than two-thirds of the capital paid in, is entitled to have the corporate assets placed in the hands of a receiver. 554 note 6.

5. Insolvent associations — adjustment of accounts between borrowing and non-borrowing members. 554 note 7.

6. May have different sorts of stock under New York statute. 553 note 1.

BONDS.*Power to issue — constitutional limitations.*

1. Under authority "to borrow money for the use of the city," the city has power to issue bonds for money so borrowed. 530 note 1.

2. The power of a municipal corporation to issue negotiable paper will not be deduced from uncertain inferences, and can be conferred only by language which leaves no reasonable doubt of an intention to confer it. 530 note 1.

3. Statutory authority to issue and market bonds, which are to run for a long period of time and bear interest, held to authorize, by implication, bonds negotiable in form. 530 note 1.

4. Constitutional limitations upon

amount of indebtedness — construction and application. 530 note 2.

5. Bonds issued in violation of Constitution are void. 531 note 3.

6. County bonds are invalid, even in the hands of bona fide purchasers, when issued without compliance with a constitutional requirement that provision shall be made, at the time of incurring any debt, for levying a sufficient tax to create a sinking fund of two per cent in addition to meeting the interest. 531 note 3.

7. Under act of Texas authorizing a county to issue bonds for building a court house, a county has no authority to issue bonds for the erection of a jail and court house combined, which is to be used as a court house only until a separate court house shall be built. 532 note 4.

8. A statute which authorized a town to subscribe for stock of a railroad company, and to raise by loans or taxes the money required to pay therefor, conferred on the town by implication the power to issue bonds. 532 note 4.

9. What is a "county purpose" for which bonds may be issued — improving navigation of river. 532 note 5.

10. A beet sugar factory not an "internal improvement" for which bonds may be issued. 532 note 6.

11. Authority to subscribe for stock and issue bonds therefor does not authorize a donation of bonds. 532 note 6.

12. What amounts to a donation of bonds — sale of stock back to company for a nominal consideration in bonds. 533 note 8.

Elections.

13. Notice of election to vote upon the issue of bonds — form and sufficiency. 533 note 9.

14. Proper notice must be affirmatively proved to sustain validity of bonds. 535 note 10.

15. Other matters pertaining to elections to vote upon the issue of bonds. 535 note 11.

Estoppel — recitals — bona fide holders.

16. Effect of recitals in bonds as an estoppel in favor of bona fide holders. 537 note 16.

17. Recitals in county bonds signed and issued by officers not authorized to issue them are not binding upon the county. 538 note.

18. A recital in county bonds that they are issued "pursuant to an order of the County Court" puts all persons dealing in the bonds upon inquiry as to the terms of the order. 538 note.

19. Municipalities are not estopped by recitals in their bonds, except as to matters of fact, nor even then if the facts recited are matters of public record, open to the inspection of every inquirer. 539 note 16.

20. A purchaser of municipal bonds is bound to ascertain whether the municipality has power to issue them, and an utter want of such power is not cured by any recitals in the bonds. 539 note 16.

21. Estoppel of county by recitals in its records as to sufficiency of petition for election to vote on the issue of bonds. 539 note 17.

22. Recital of authority under which bonds are issued not conclusive on bondholder. 540 note 18.

Excessive issue — rights of holders.

23. An issue of county bonds in aid of a railroad in excess of limit is void in toto and cannot be enforced to extent authorized. 520.

24. The holders of such bonds have no remedy in equity to enforce any part of such bonds either on the theory that the county has received a consideration therefor in the construction of the railroad, or intended to make a valid donation, or otherwise. 520.

25. Where bonds are issued at one time in excess of the amount authorized, the holders are severally entitled to enforce them in the proportion of the authorized issue to the total issue. 540 note 20.

26. Where bonds are issued at different times under an act limiting the total amount to be issued, the fact that bonds are issued beyond the limit does not invalidate such bonds as were issued and sold before the limit was reached. 540 note 20.

Miscellaneous.

27. Bonds must comply with statutes specifying what they must show upon their face. 536 note 12.

28. Bonds must conform to statute as to time of payment. 536 note 13.

29. Railroad company must comply with conditions precedent before being entitled to bonds voted in its favor. 536 note 14.

30. Whether bonds voted to one railroad company can be claimed by its grantee and successor. 540 note 19.

31. A proposition to vote bonds in aid of a railroad, when accepted, is in the nature of a contract, and if the electors, through false or fraudulent representations of the officers of the donee, have been induced to vote such aid, a court of equity in a proper case will relieve as against such bonds. 537 note 15.

32. Where a village council authorizes the president and clerk to sign bonds, but gives no authority to deliver them, a delivery by the president confers on the holder no right to enforce payment. 541 note 21.

33. Officers may issue less than amount of bonds authorized. 541 note 21.

34. Compelling levy of taxes to pay bonds. 541 note.

35. Whether bonds constitute a part of the general indebtedness of city issuing them. 541 note.

36. Laws passed subsequent to the issue of bonds which unduly restrict the right of the holder to enforce payment, impair the obligation of the contract evidenced by the bonds. 541 note 21.

37. Five persons as taxpayers brought suit against the mayor and clerk of a city, who were authorized to execute and deliver bonds to a commissioner for sale, to restrain the issue of such bonds, and were defeated. Afterwards two of the five sued the city and its marshal to restrain the collection of taxes to pay interest on the bonds. Held, that there was sufficient identity of parties to justify the application of the defense of res adjudicata. 542 note.

CANCELLATION.

See INSURANCE, 13, 14.

CARRIERS.

I. IN GENERAL.

II. DISCRIMINATION.

See STREET RAILROADS.

I. IN GENERAL.

1. When goods are shipped from New York to Chicago, the contract of shipment will be controlled by the laws of New York. 19.

2. Acceptance of a bill of lading containing conditions, after the goods have been received by the carrier, and partly transported by him under an oral contract without such conditions, does not make the conditions binding on the shipper. 19.

8. A carrier gave a shipper a receipt for goods which referred to a bill of lading to be given thereafter, and directed attention to certain conditions printed on the back. There had been a previous oral agreement in regard to the shipment of the goods. Held, that the receipt did not constitute a contract of shipment, and that the conditions were a mere notice, not binding on the shipper. 19.

Limiting liability.

4. A stipulation in a contract for the shipment of live stock, that the carrier shall not be liable for injuries to the stock, though caused by the negligence of its servants, is void. 354.

5. In the absence of an agreed valuation, a contract for transportation of horses by a railroad company, providing "that the liability of the company shall not, in any event, exceed one hundred dollars per head" for damages resulting from its negligence, is void. 354.

6. When receipt or bill of lading with limitations of liability not binding upon the shipper — effect of prior oral agreements or negotiations. 25 note.

7. Limiting liability in case of gratuitous passengers. 719 note 1.

8. Right to limit liability for negligence in case of passengers not paying fare, but for whose transportation the carrier receives some consideration. 720 note 2.

Regulation of charges — reasonableness of rates.

9. A state has an undoubted right to regulate the fares and freights which may be charged and received by railroads or other carriers, and such regulation may be effected by means of a commission. 641; 674 note 1.

10. Power of state to regulate the charges of federal railroad corporations with respect to intrastate traffic. 674 note 2.

11. Common carriers are entitled to charge a reasonable compensation and no more. 619 note 1.

12. The determination of a question as to the reasonableness of rates for carriage imposed by a state upon a railroad company may be affected by the fact that part of the railroad owned and operated by it is outside the state. 674 note 1.

13. Where it appears that a railroad cost more than its stock and bonds outstanding; that it has been and is economically managed; that it has voluntarily reduced its tariffs an aggregate of more than fifty per cent; that it has never paid any dividend on its stock and that a system of rates established by commissioners will so reduce the earnings that they will not pay the interest on the bonded debt above operating expenses, such rates will be enjoined as unjust and unreasonable. 641.

14. A bill by shipper will not lie to enjoin the adoption and enforcement of rates fixed by railroad commissioners. 676.

II. DISCRIMINATION.

Statutes.

15. Federal and state statutes as to discrimination and undue preference or prejudice. 273 note 2.

16. English statutes as to discrimination and undue preference or prejudice. 274 note 3.

17. Statutes prohibiting discrimination and undue preference or prejudice are declaratory of the common law. 276 note 4.

What constitutes unjust discrimination — various instances of discrimination.

18. The making of special rates on coal to a manufacturing corporation for use in its business, pursuant to a contract with the promoters of the corporation before its organization, is not an unjust discrimination against coal dealers in the same place. 252.

19. The fact that the manufacturing concern, without the knowledge of the railroad company, sold to its employees coal so carried for it is immaterial, in the absence of proof that any damage resulted therefrom to the coal dealer. 252.

20. Differences in circumstances and conditions held to justify a discrimination in charges. 252.

21. When the facts are ascertained or undisputed the question of the

existence of an "undue or unreasonable discrimination" is for the court. 252.

22. Lawful discriminations are not made unlawful by secrecy. 252.

23. At common law all shippers stand on an absolute equality with reference to transportation by common carriers, and no such carrier has the right to discriminate in favor of one as against another. 630.

24. A contract to carry freight at less than the schedule rate by allowing and paying a rebate is not *prima facie* void, either at common law or under the Constitution of Colorado. 630.

25. Validity of contract for rebates. 638 note.

26. Discrimination between localities. 303 note 16.

27. Every circumstance which affects the cost of service, as between two localities served by the same road, affords a legitimate basis for a difference in rates. 305 note.

28. The volume of traffic to one place may be so much greater than to another that it can be worked more economically, and this is held to justify a difference in rates in favor of the place having the greater traffic. 305 note.

29. The rates, as between localities, should be relatively just and equal. 305 note.

30. Whether the fact that one locality enjoys competition in transportation is a factor to be considered in determining whether the rates between that and other localities served by the same road are relatively just. 305 note.

31. A railroad cannot be said to discriminate against a locality which it does not serve, although it may make rates to other localities which give the latter an advantage over the former. 306 note.

32. It is held that there may be an unjust discrimination between localities although they are not in competition. 306 note.

33. Discrimination between individuals by serving some and refusing others. 277 note 5.

34. Discrimination in the order of forwarding goods. 277 note 6.

35. Discrimination in receiving or delivering freight. 278 note 7.

36. A railroad company may not discriminate between different grain

elevators of the same place, either by contracting to deliver exclusively to certain favored elevators, or by charging a discriminating tariff, when all are connected by side tracks and are equally accessible. 229 note.

37. Affording free cartage to or from stations to some and denying it to others is an undue preference. 279 note.

38. Discrimination between hackmen, draymen and others, engaged in carrying goods and passengers to and from stations. 280 note 8.

39. Discrimination in facilities or accommodations afforded shippers or passengers at stations. 281 note 9.

40. Granting side tracks to some and refusing the same to others, under similar circumstances, is an undue preference. 281 note 9.

41. The charging a gross sum to include carriage and also collecting and delivery, is an inequality, and prejudicial to carriers who do their own collecting and delivering. 309 note 17.

42. The affording any facilities to its own agents or to favored carriers in the receiving or delivery of goods, which are denied to other carriers, is an undue prejudice of the latter. 309 note 17.

43. The accommodations afforded passengers at stations must be the same or equal for all. 282 note 9.

44. Discrimination in the quality of the service rendered. 282 note 10.

45. Distinctions based upon quantity — less than carloads, carloads and trainloads. 282 note 11.

46. Discriminations in aid of industrial enterprises or based upon the uses and purposes for which the goods are intended or upon the ultimate destination of the traffic. 285 note 12.

47. Discriminations based upon the origin of the traffic, or made in favor of traffic which would otherwise seek a different route. 287 note 13.

48. Discrimination by means of classification. 295 note 14.

49. Discrimination between commodities. 295 note 14.

50. Group rates — whether a discrimination. 301 note 15.

51. Discriminations against express companies and against carriers of express matter. 307 note 17.

52. Discriminations based upon the shipment of large aggregate or guaranteed quantities. 309 note 18.

53. Reduced rates in consideration of collateral agreements not relating to the traffic in question. 316 note 20.

54. Reduced rates in consideration of contracts securing to the carrier the whole or some portion of the shipper's business for a specified time or other like advantages — season contracts. 314 note 19.

55. A railroad company cannot discriminate in its local rates, according as traffic comes or goes by one connecting carrier or another. 318 note 21.

56. Discrimination between oil shipped in tanks and oil shipped in barrels. 318 note 21.

57. Discrimination between connecting carriers. 317 note 21.

58. Under a statute making it unlawful for a carrier "to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property, under similar circumstances and conditions, for a shorter than a longer distance over the same line in the same direction," held, that whether the transportation was upon the same line, in the same direction and under similar circumstances and conditions was a question for the jury. 606.

59. Held, also, that to make out a case of unlawful discrimination it was not necessary to show that any shipment was actually made over the greater distance on the same dates as plaintiff's shipments, since defendant, in advertising certain rates for the greater distance, must be deemed to have "charged" such rates within the meaning of the statute. 606.

Remedies for unjust discrimination — damages.

60. Remedies for unjust discrimination generally. 619 note.

61. Any sum exacted and paid in excess of a reasonable charge may be recovered back in an action for money had and received. 620 note 2.

62. If discriminative charges are unreasonable in amount, an action lies to recover back the excess over a reasonable sum. 620 note 3.

63. Whether an action lies to recover back any portion of a discriminative charge where the same is not unreasonable in itself — effect of the rule of equality. 620 note 4.

64. A greater charge for the same service, or for a less service, where the

greater includes the less, is prima facie unreasonable and excessive. 623 note 5.

65. The question of voluntary payment in suits to recover back excessive charges. 625 note 6.

66. Action in tort for damages occasioned by unjust discrimination. 628 note 8.

67. Remedy in equity. 630 note 9.

68. Remedy by mandamus. 630 note 10.

69. Remedy by quo warranto. 630 note 11.

70. Limitations — fraudulent concealment of cause of action. 627 note 7.

71. Under act making a railroad company liable to a person injured by unjust discrimination in charges "for damages treble the amount of injury suffered," the "injury suffered" must be proved, and it is not to be measured by the total amount of the discriminations complained of. 252.

72. Where plaintiff had been charged more for a shorter than others were charged for a longer distance over the same line in the same direction, in violation of the statute, he is entitled to recover the excess he has paid over the charge for the longer distance. 606.

CHANGE OF STREET GRADE.

1. Under a Constitution prohibiting the taking or damaging of private property for public use without compensation, a city is liable for damages to property from a material change in the grade of a street from the natural surface. 117; 122 note 1.

2. A city is not, however, liable for damages from such change to improvements put on the property after the grade to which the change is made has been established and made a matter of record. 117.

3. Effect of Constitution giving compensation for property damaged upon a change of grade ordered before but made after its adoption. 123 note 5.

4. What amounts to a change of grade — lowering embankments on side of street to correspond with grade of center. 122 note 2.

5. Elements and measure of damages. 123 note 4.

6. Whether damages to property on intersecting street can be recovered. 123 note 3.

CHARGES, REGULATION OF.

See CARRIERS, 9-14; RAILROADS, 9-18.

CHECKS.

See BANKS AND BANKING, 6-15.

CONFLICT OF LAWS.

See INTERSTATE LAW.

CONTRACTS.

See CORPORATIONS; INSURANCE, 15-19; TELEGRAPH COMPANIES, 11-17.

1. The right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended, since this would subvert the right to enjoy liberty, to acquire property, and to pursue happiness, declared to be inalienable rights by the Constitution. 185.

2. Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it. 520.

3. Validity of contracts which exonerate a person from liability for negligence. 710 note.

CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence for an intelligent boy, ten years old, while walking along a sidewalk, to grasp a guy wire from an electric light pole which was hanging to the ground, there being nothing to indicate that it was charged with electricity. 418.

CORPORATIONS.

See DIRECTORS AND OFFICERS; FOREIGN CORPORATIONS; STOCK AND STOCKHOLDERS.

Incorporation — validity.

1. A corporation which has for its object the purchase of land and the construction of houses thereon, and finally the allotment of the lots and houses among the stockholders in satisfaction of their stock, is one organized for the purpose of carrying on a lawful business, and authorized by

the general incorporation laws of Nebraska. 240.

2. Under act requiring certificates of incorporation to be recorded in the office of the recorder of the county where the chief operations are to be carried on, subscribers who have failed to record their certificate do not become legally incorporated, and are liable, as partners, for company debts. 502.

Corporate existence — admissions — estoppel.

3. In an action by the state to forfeit a corporation's charter, the corporation is a necessary party defendant, and making it such is not an admission of its corporate character, so as to preclude the state from questioning its right to corporate existence. 504 note 1.

4. Filing an information in quo warranto against a corporation by its corporate name is an admission that it has been legally incorporated. 1.

5. Estoppel by contract to deny incorporation. 71 note.

6. A party who has contracted with a corporation de facto, as such, cannot be permitted, after receiving the benefits of his contract, to allege any defects in the organization of such corporation affecting its capacity to enforce such contract. 63.

7. Plaintiff made a contract with defendants who were doing business under the name of "Hughes & Gawthrop Company." He was ignorant of any claim or attempt on their part to be incorporated. Held, that the name did not necessarily indicate an incorporation, and that plaintiff was not estopped by his contract from treating the defendants as partners. 502.

8. Acceptance of a note signed by the corporate name, from members of an alleged corporation, in payment for work done at their request, does not estop the creditor to deny the corporate existence, and sue them, as partners, for the price of the work. 502.

9. One who has recognized a corporation by suing it in its corporate name, cannot, in the same proceeding, be heard to deny its corporate existence. 72 note.

10. Proof of corporate existence in collateral proceeding. 504 note 3.

11. Evidence of the passage of an act incorporating a company, and that certain persons are doing business

under the corporate name, is insufficient to prove that the corporation has been organized under the act. 504 note 3.

12. In an action by a national bank, plaintiff may prove that it is a corporation de facto by parol evidence that it is carrying on a general banking business as a national bank. 72 note 2.

13. In a suit against a private corporation the complaint is fatally defective unless it contains an unequivocal averment that it is a corporation. 72 note 2.

14. Pleading and proof of incorporation. 72 note 2.

Legislative control—payment of wages.

15. Validity of act regulating the payment of wages by specified corporations. 185, 213 note.

16. An Illinois statute that every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation, and every incorporated express company and water company, should pay its employees weekly was held to be unconstitutional. 213 note.

Insolvent corporations—preferences.

17. The capital of an insolvent corporation is a trust fund for the payment of its debts. 55.

18. The assets of an insolvent corporation, which has ceased to do business, with no intention to resume, constitute a trust fund for the payment of its debts, and the corporation has no power to execute a preferential deed of trust in favor of certain creditors, whether officers, stockholders or otherwise. 29.

19. No such power is conferred by statutes authorizing corporations (1) "to hold, purchase, sell, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require;" (2) "to enter into any obligation or contract essential to the transaction of its authorized business;" or (3) "to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and to execute bonds or promissory notes therefor, and to pledge the property and income of the corporation," as these all relate to the purposes and business of the corporation as a going concern. 29.

20. Right of insolvent corporation to prefer creditors. 50 note.

21. Whether directors of an insolvent corporation may prefer themselves. 61 note.

22. A director of an insolvent corporation, who is also a creditor, cannot take advantage of his superior means of information to obtain a judgment by confession from the corporation, and so secure his debt as against other creditors. 55.

23. Who is a laborer within statute making claims for labor preferred. 54 note 2.

Forfeiture of charter.

24. The facts that all the officers, directors and stockholders of a corporation are non-residents, and that part of its business is transacted out of the state, do not constitute a ground of forfeiture. 1.

25. A technical violation of the statute requiring books of account to be kept at its office in the state, is not a ground of forfeiture, where the books are kept just across the state line and are brought into the state whenever demanded by any one entitled to inspect them. 1.

26. The facts that a corporation has no sign at its office, and that it has not had its property listed for taxation, are not grounds for forfeiting its charter. 1.

27. Failure to acknowledge certificate of incorporation as required by law is cause for forfeiture. 504 note 2.

28. Effect of failure to maintain an office in state where incorporated, as a ground of forfeiture. 17 note.

Negligence in ultra vires undertaking.

29. Though the maintenance of a ferry by an educational corporation is ultra vires, such corporation is liable for injuries to a passenger being transported thereon for hire, caused by the negligence of the employee in charge. 79

30. Where the managing officers of a corporation know that an unauthorized business is being carried on by persons claiming to act as its agents, and adopt the acts of its treasurer in receiving the income of its business and paying its expenses, a ratification is shown. 79.

Miscellaneous.

31. A corporation does not possess the general power of contracting

which a natural person has, but it is limited to the exercise of such powers as are expressly conferred by statute or necessarily implied. 29.

32. When the minority of stockholders may have relief against the acts or management of the majority. 140 note.

CROSSINGS.

See RAILROADS, 1-4.

DAMAGES.

See CHANGE OF GRADE; INSURANCE, 71; RAILROADS IN STREETS, 9, 10; TELEGRAPH COMPANIES, 18-23.

DIRECTORS AND OFFICERS.

See BANKS AND BANKING, 24-30; CORPORATIONS, 16-22.

Liability of directors of corporation not legally organized for debts contracted in its name. 505 note 4.

DISCRIMINATION.

See CARRIERS, 15-72.

ELECTIONS.

See BONDS, 13-15.

ELECTRICITY.

See TELEGRAPH COMPANIES.

Wires in street — personal injuries.

1. Evidence that a guy wire from an electric light pole had become detached and was hanging loosely across the sidewalk; that it had become charged with electricity from a trolley wire, through another guy wire which crossed the trolley, and that a person walking along the sidewalk came in contact with the first wire and was injured, makes a prima facie case of negligence on the part of the light company. 418.

2. Electric light companies having their lines along a street are charged with the highest degree of care in the construction, inspection and repair of their wires and poles, that travelers along the street may not be injured thereby. 418.

3. Liability of city for injury to traveler on street by electricity from hanging wire. 424 note 2.

Wires in street — interference — ordinance.

4. A telephone company having its wires strung in the streets by license of the city may have mandamus to a street car company, thereafter licensed to use electric power on the same streets, to obey an ordinance requiring it to string guard wires to its trolley wire in places where it must cross the telephone wires. 319.

5. An ordinance requiring a street car company to string guard wires at the crossings with other lines of wire is not unreasonable nor an undue exercise of the police power. 319.

6. Mandamus is an appropriate remedy to enforce the duty imposed by such ordinance, and the relator is not obliged to wait until damage has actually been sustained. 319.

EMINENT DOMAIN.

See CHANGE OF GRADE; RAILROADS IN STREETS; STREETS AND HIGHWAYS.

1. The owner of land in the vicinity of a railroad may recover for injury to his property caused by the noise, confusion and disturbance arising from the passage of trains and from engines in its yards. 73.

2. The owner of a business stand abutting upon a public alley sustains special damage if, by the illegal obstruction of the alley, customers are prevented from using the same as a means of access to the stand, for the purposes of trade, as they have been habitually doing for many years previously. 113 note 1.

EQUITY JURISDICTION.

See CARRIERS, 67.

ESTOPPEL.

See BONDS, 16-22; CORPORATIONS, 8-9; STOCK AND STOCKHOLDERS, 17, 18.

EXPRESS COMPANIES.

Express companies do not come within the Interstate Commerce Act. 808 note.

EVIDENCE.

Assuming plaintiff to have suffered a nervous shock, caused by an accident, it is not error to allow an expert to testify as to its probable or *possible* immediate effect on his body and mind. 484.

FIRES.

See RAILROADS, 14-22.

FOREIGN CORPORATIONS.

1. A corporation organized by citizens of New York under the laws of another state, and doing business in New York only, will be recognized as a valid corporation in New York. 155.

2. Pleading and proof of corporate existence. 167 note 2.

3. Validity of contracts made before complying with the statutes as to doing business in state. 173 note 9.

4. The courts of Massachusetts will not take jurisdiction of a suit by the stockholders of a Missouri corporation to enjoin the corporation from issuing bonds secured by mortgage on property in Missouri. 173 note 8.

5. The Federal Circuit Court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations. 173 note 8.

6. Power of foreign corporation to hold and convey real estate. 155, 169 note 5.

7. An individual dealing with a foreign corporation *de facto* cannot object to its title to land on the ground that it has exceeded its authority to deal in land, the laws under which it is incorporated conferring some authority to acquire and convey land, and it being for the state under which it is incorporated to inquire into any excessive use of corporate powers. 155.

8. Service of process upon foreign corporations — who are agents within the meaning of statutes as to service. 169 note 6.

9. Garnishment of foreign corporations. 172 note 7.

10. In the absence of any statutory provision, certificates of stock in a foreign corporation are not subject, as choses in action, to garnishment pro-

cess under a writ of attachment. 172 note 7.

11. Taxation of foreign corporations. 168 note 3; 169 note 4.

FORFEITURE.

See CORPORATIONS, 23-27; INSURANCE, 36-38, 84.

GARNISHMENT.

See FOREIGN CORPORATIONS, 9, 10; INSURANCE, 39, 40.

INDICTMENT.

Sufficiency of indictment under National Banking Act for making false entries. 234 note.

INJUNCTION.

Whether legislative action of municipal bodies may be enjoined. 90 note.

INSOLVENT CORPORATIONS.

See BANKS AND BANKING, 46-48; BUILDING AND LOAN ASSOCIATIONS, 4, 5; CORPORATIONS, 16-22.

INSURABLE INTEREST.

See INSURANCE, 79, 80.

INSURANCE.

I. FIRE INSURANCE.

II. LIFE AND ACCIDENT INSURANCE.

I. FIRE INSURANCE.

Agents.

1. Knowledge of general agent is knowledge of company. 371 note 3.

2. A communication of facts material to a risk, made to a clerk sent by an agent to solicit insurance, is notice to the company. 371 note 2.

Application.

3. Effect of misstatements in application filled out by agent of insurer. 371 note 4.

4. Effect where insured gives correct information and agent of company writes untrue answers. 412 note 2.

5. A provision in a policy withholding from agents authority "to make, alter or discharge this or any other contract in relation to the matter of

this insurance," does not limit the powers of the insurer's agents in preparing and accepting an application for insurance. 412 note 3.

Arbitration.

6. Arbitration can only be demanded in strict conformity to policy. 372 note 5.

7. Whether arbitration a condition precedent to suit. 372 note 5.

8. When award vitiated by fraud, mistake, etc. 374 note.

9. Setting aside award because arbitrator "interested"—construction of words "disinterested person." 373 note.

10. Waiver of provision as to arbitration. 372 note 5.

11. Whether mortgagee to whom loss is payable is bound by result of arbitration between insurer and insured. 372 note 5.

12. A stipulation for a submission to arbitration, which does not provide for the number of arbitrators, nor the mode of their selection, is too indefinite to be enforced. 372 note 5.

Cancellation.

13. What is sufficient notice of cancellation. 374 note 7.

14. A local custom that insurance agents, after the termination of their agency, may cancel any of the policies issued through them, is unreasonable and void. 374 note 7.

Contract, how made.

15. A valid contract of insurance may be made by parol, when not forbidden by statute. 363, 375 note 9.

16. When nothing is said in the negotiations about special rates of insurance, or special conditions of the policy, it will be presumed that those which were usual and customary were intended. 363.

17. What sufficient to make a complete and binding contract. 374 note 8.

Construction of contract.

18. Divisibility of contract. 376 note 10.

19. Where there is an inconsistency or want of harmony between the printed and written part of the policy, the latter must control. 376 note 11.

Conditions, their construction and effect, and what amounts to a breach thereof.

20. As to occupancy. 376 note 13.

21. As to incumbrances. 377 note 14.

22. As to insured's title in interest. 377 note 15.

23. As to change of title, interest or possession by foreclosure, legal process, etc. 378 note 16.

24. As to voluntary change of title. 379 note 17.

25. As to repairs. 379 note 18.

26. As to keeping watchman on premises. 379 note 19.

27. As to other insurance. 379 note 20; 380 note 21.

28. As to increase of risk. 381 note 24.

29. As to fraud and false swearing by insured. 381 note 25.

30. As to use of naphtha on premises—burning off paint with naphtha torch. 381 note 22.

31. As to night work and keeping fire-extinguishing appliances. 381 note 23.

32. Construction of conditions generally. 376 note 12.

33. Conditions which create forfeitures will be construed most strongly against the insurer. 376 note 12.

Defenses.

34. Fact that policy does not comply with statutory requirements as to form is no defense to company. 396 note 47.

35. Failure of foreign company to comply with statute as to doing business is no defense, as company is estopped to deny its authority to issue policy. 396 note 47.

Delivery of policy.

36. When the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent. 363.

Forfeiture.

37. Forfeiture for non-payment of premium or assessments. 382 note 26.

38. Where policy provides that, if any change takes place in the possession of the property insured, "then the policy shall be void," it is not necessary for the company to declare it void on notice of a breach of the condition, to entitle it to take advantage thereof. 383 note 27.

39. Waiver of forfeiture — what amounts to. 394 note 45.

Garnishment.

40. Garnishment in another state — effect. 383 note 28.

41. Right of, when company elects to rebuild. 383 note 29.

Interest.

42. The amount due on an insurance policy should be computed at the legal rate of the place of payment, and not at the place where suit is brought thereon. 415 note 11.

Insurable interest.

43. One who is in possession of property under contract of purchase from the equitable owner thereof, has an insurable interest therein. 383 note 80.

44. Warehousemen have an insurable interest in cotton stored with them, they having contracted to indemnify the owners thereof for the loss. 383 note 30.

Limitations.

45. Where a policy provides that no action shall be maintained thereon until after an arbitration has been had and award made, nor unless the action shall be commenced within twelve months from the date of the fire, but does not limit the time within which the arbitration must be had, the twelve months' limitation does not begin to run until an award has been made. 383 note 31.

Notice and proofs of loss.

46. Whether failure to furnish within the time specified, forfeits the policy. 385 note 34.

47. Sufficiency of proofs or notice. 386 note.

48. Waiver of proofs. 386 note.

49. Waiver of defects or delay in proofs of loss submitted. 387 note.

50. A denial of all liability by the insurer, before the time to make proofs of loss has expired, waives the requirements of the policy as to furnishing such proofs. 386 note.

51. Where proofs of loss are retained by the company without objection, defects therein will be regarded as waived. 388 note.

52. The insistence of an insurance company to examine insured after receiving proofs of loss, is a waiver of

any objection to such proofs founded on the delay in furnishing them. 388 note.

53. Where proof of loss is furnished to the insurance company, to which it objects, it must return the same, with its objections, within a reasonable time, or its objections will be unavailing. 388 note.

Parties and pleading

54. Who is the proper party plaintiff in suit on policy. 388 note 35.

55. Where insured assigns policy as security for an obligation and the obligation is discharged, he may sue in his own name. 389 note.

56. The person to whom the loss is made payable may maintain an action in his own name for the amount of the loss, where the value of his interest in the property exceeds such amount. 389 note.

57. Pleading in suit on policy. 389 note 36.

58. In an action on a fire policy, destruction of the property by the owner is a defense which cannot be proven unless specially pleaded, even though the complaint avers that the destruction was without any fraud, negligence, procurement or privity of his. 390 note 36.

Premium — waiver of payment.

59. An agent authorized to make contracts of fire insurance and issue policies may waive payment in cash of the premiums, and give time for their payment, unless there are restrictions upon his authority of which the insured has notice. 363.

60. When waiver of prepayment may be implied. 363.

Property and risks covered by the policy.

61. Property and risks covered by the policy generally. 390 note 37; 391 note 39.

62. An insurance policy covering a two-story brick dwelling house, "and its additions adjoining and communicating," embraces a frame addition adjoining and communicating with the brick building. 390 note 37.

63. In an action upon a policy insuring building, machinery, dynamos and other electrical fixtures, it appeared that the fire produced a short circuit in the wires connecting with machinery in a part of the building remote from

the fire, and caused such a strain on the machinery as to break it to pieces. Held, that the fire was the direct cause of the damage to the machinery. 390 note 37.

64. Where policy provides that the insurer shall not be liable for loss caused by "explosion of any kind, unless fire ensues, and then for the loss or damage by fire only," no liability exists for damage done by an explosion produced by the ignition of a match in a room filled with illuminating gas, since the explosion of the gas, and not the lighting of the match, is the proximate cause of the loss. 390 note 38.

Reformation of policy.

65. When policy may be reformed on ground of mistake. 384 note 33.

Subrogation.

66. An insurer of a carrier against loss of cargo, under a policy for the benefit of whom it may concern, is not subrogated to the shipper's rights against the carrier by reason of paying the loss to the shipper, upon the carrier's order. 391 note 40.

Waiver.

67. Waiver of conditions generally—power of agents. 391 note 41.

68. Effect of issuing policy with knowledge or notice of facts in violation of condition. 393 note 43.

69. Effect of issuing policy without information or inquiry, when facts exist which constitute a violation of policy. 394 note 44.

70. Waiver of condition may be proven under averment of performance. 393 note 42.

71. When a policy is issued to a person by an agent by direction of insurers' secretary, who have knowledge that he has other insurance, the right to forfeit the policy on that ground is waived. 397.

Miscellaneous.

72. Measure of damages—rules for estimating loss. 383 note 32.

73. Where an insurance was several times renewed without issuing a new policy and then was renewed by a new policy, it is the duty of the insured to take notice of any change of the conditions in the policy. 396 note 47.

74. In a policy of insurance the house insured was described as "occu-

pied as a sporting house." Held, that it cannot be said that the policy shows conclusively that the occupancy of the house was for unlawful purposes. 396 note 47.

II. LIFE AND ACCIDENT INSURANCE.

75. Where an application is accepted and credit given for the premium, the contract of insurance is complete, and the fact that the policy, sent by mail, does not reach its destination until after the assured's death does not prevent a recovery thereon. 397.

76. Contract made by the application and its acceptance may be enforced and policy ignored. 397.

77. A policy of life insurance which is delivered and the first premium on which is paid in the state in which the assured resides is governed by the laws of that state. 413 note 7.

78. Change of beneficiary. 412 note 6.

79. Company bound by agent's classification of insured's occupation. 405 note 7.

80. One has an insurable interest in the life of another who, out of friendship, and without any bonds of kinship, has assumed the position of father to him. 406.

81. What constitutes an insurable interest in life of another. 415 note 12.

82. Application—effect of untrue statement in, when agent knows facts. 403 note 1.

83. Effect of false statements in, when truth of same warranted. 411 note 1.

84. Application to be construed in insured's favor. 404 note 2.

85. Forfeiture for non-payment of premium—extension, waiver, etc. 413 note 8.

86. Note accepted by agent in payment of premium without authority—want of consideration. 415 note 10.

87. Default in payment of premium—right to new policy for a proportion of sum insured. 414 note 8.

88. The oral agreement of the secretary of a life insurance company, made outside the state in which its general offices are located, to waive payment of a premium at maturity, is binding on the company. 414 note 8.

89. A drowning caused by a temporary trouble to which the insured

was not subject, but which was entirely unusual, whereby he fell into the water, is "accidental," within the meaning of an accident insurance policy. 406 note 10.

90. Under a provision that the risk shall not be extended to "accidental injuries or death resulting from or caused, directly or indirectly," by fits, vertigo or other disease, an accidental death by drowning results from and is caused indirectly by fits, vertigo or other disease, if the fall into the water from which drowning ensues is caused by such disease. 406 note 10.

91. Where a total paralysis of both legs results from an accident to insured, he has sustained a loss of both feet within the meaning of a policy. 404 note 8.

92. The cleaning of a gun not known to be loaded, and which is discharged on account of an unknown defect, is not a "voluntary exposure to unnecessary danger," within an accident policy. 405 note 8.

93. "Voluntary exposure to unnecessary danger and hazardous or perilous adventure," in an accident insurance policy, means wanton or grossly imprudent exposure. 405 note 8.

94. Exemptions from liability — suicide. 416 note 14.

95. Exemptions must be specially pleaded to be available as a defense. 406 note 11.

96. What sufficient compliance with provision as to notice and proofs of injury or death. 404 note 4; 415 note 18.

97. Waiver of proofs of loss. 405 note 5; 415 note 18.

98. When a creditor, in ignorance of the death of the insured, surrenders a policy upon the life of his debtor for a paid-up policy less in amount, he is entitled to have the original policy reinstated. 417 note 17.

99. Surrender of policy by creditor to insurer, after tender of his claims, by the representatives of the insured, does not affect right of latter to sue upon policy. 418 note 18.

100. Reinstatement of policy — construction of provision as to. 416 note 15.

101. Where a policy provides that suit must be brought within a year from the date of the accident, and seven months after the accident the company notify insured that it de-

clines to pay, a suit after the expiration of the year will be barred. 405 note 6.

102. Proceeds of policy — conflicting claims to — rights of creditors and others. 416 note 16.

INTEREST.

See INSURANCE, 41.

INTERSTATE COMMERCE.

A shipment between two points in the same state is not interstate commerce because a part of the track over which the shipment is made lies in another state. 606.

INTERSTATE LAW.

See CARRIERS, 1.

LIFE INSURANCE.

See INSURANCE, 74-101.

LIMITATIONS.

See INSURANCE, 44.

LIMITING LIABILITY.

See CARRIERS, 4-8; TELEGRAPH COMPANIES, 11-17.

LOCAL IMPROVEMENT.

See MUNICIPAL CORPORATIONS, 6, 7.

MANDAMUS.

See CARRIERS, 68; ELECTRICITY, 6.

MASTER AND SERVANT.

See RAILROADS, 45-49.

MILEAGE TICKETS.

See RAILROADS, 7, 8.

MUNICIPAL CORPORATIONS.

See BONDS; ELECTRICITY; STREET RAILROADS; STREETS AND HIGHWAYS.

Powers.

1. A municipal corporation can exercise only such powers as are granted

to it by its charter or by the general law of the state, either in express words or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation. 542.

2. A municipal corporation, under a general grant of authority, cannot adopt ordinances which infringe the spirit or are repugnant to the policy of the state, as declared in its legislation. 542.

Enjoining passage of ordinance — jurisdiction of equity.

3. It is a general principle that the judicial department has no direct control over the legislative department, and this principle extends to the local legislative bodies of municipal corporations. 85.

4. A city council or board of trustees of an incorporated town, when acting, or proposing to act, in a legislative capacity upon a subject within the scope of its powers, is entitled to immunity from judicial interference. 85.

5. The passage of an ordinance, granting to a company a right to construct and operate water works in a town, will not be enjoined on the ground that such an act would violate the exclusive rights conferred upon another company by a previous contract. 85.

Street sprinkling not a local improvement.

6. Street sprinkling is not a "local improvement" within the meaning of a statute authorizing cities and villages "to make local improvements by special assessment, or special taxation, or both, of contiguous property, or general taxation or otherwise as they shall by ordinance prescribe." 425.

7. The decision of the city council that a proposed act constitutes a "local improvement" within the meaning of the statute is not conclusive. 425.

Reasonableness of ordinances — regulating livery stables.

8. An ordinance expressly authorized by specific and definite legislative authority will be upheld, unless it conflicts with the Constitution of the state or nation. 542.

9. An ordinance which the municipality assumes to pass by virtue of its

incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair and impartial, and not arbitrary or oppressive. 542.

10. A livery stable in a town or city is not per se a nuisance, though it may become a nuisance, if not constructed, kept and used in a proper manner. 542.

11. An ordinance prohibiting the location of a livery stable in or opposite any block in which a school building is situated, without reference to the manner in which such stable is constructed, kept or used, and without further specifying the distance, held, unreasonable. 542.

Defective sidewalks — snow and ice.

12. A sidewalk is defective if, in consequence of its construction, some special cause for the formation of ice exists rendering the sidewalk unsafe, though the ice is smooth. 216.

13. A jury is warranted in finding that a gutter about fourteen inches wide and one and one-half inches deep, extending across the sidewalk, is a defect. 216.

14. A city is not liable for accidents occasioned by mere slipperiness caused by ice on a sidewalk, where the ice is not so rough or uneven or so rounded up or at such an incline as to make it an obstruction. 219 note.

15. Failure of a city to remove ice from a depression at the crossing of two sidewalks, caused by a slight difference in the grades of the sidewalks, or to cover or place a guard around such ice to protect travelers, is not actionable negligence. 220 note.

16. Liability for injuries resulting from snow or ice upon sidewalks and crossings. 219 note.

Defective sidewalks — openings for use of abutters.

17. Duties and liabilities of abutters and municipality in respect to openings in or near sidewalk for benefit of abutting property. 688 note; 690 note 3.

18. Liability as between landlord and tenant. 695 note 4.

19. It is the duty of a city to supervise the construction of a cellarway in the sidewalk, built by an abutting owner, and to cause the use of suitable precautions to prevent accidents, and it will be liable for injuries resulting

from neglect of duty in this regard. 685.

20. Where a trap door over a cellarway in a sidewalk was insufficient by reason of defective construction and a traveler was injured thereby, the city was held liable. 685.

21. Where a diligent performance of the duty of supervision in the construction of a covering over a perilous excavation in a street would bring knowledge to the officers of the defect and the dangerous character of the same, a want of such knowledge is negligence. 685.

22. Where a municipal corporation has been compelled to pay damages sustained by reason of a defect in a sidewalk, which defect has been created or negligently permitted to exist by the owner or occupier of the abutting property, it may indemnify itself by an action over against such owner or occupant. 696 note 4.

Liability to children playing — dangerous embankment.

23. Where a city negligently permits an embankment on the side of a street to exist in a dangerous condition, it will be liable to one injured by its fall. 496.

24. A child may lawfully play in a public street, and, if injured by a defect in the street due to the negligence of the city, the latter will be liable. 496.

25. Liability for injury to child while playing in street by reason of defect therein. 501 note.

Notice of defect or injury.

26. The fact that the notice to defendant city designated the place where plaintiff fell as situated two feet from the gutter constituting the defect did not render it insufficient, when it fully described the scene of the accident, and there was no intention to mislead, and defendant was not misled. 216.

27. Where the defect is not due to the direct act of the city, it is essential to liability that it should have had notice of the defect or that it should have existed such a length of time that ignorance thereof would be negligence. 496.

NATIONAL BANKS.

See **BANKS AND BANKING.**

NEGLIGENCE.

See **CONTRACTS; CONTRIBUTORY NEGLIGENCE; ELECTRICITY; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES; STREET RAILROADS; TELEGRAPH COMPANIES.**

NOTICE.

See **BONDS; INSURANCE, 45-52, 95, 96; MUNICIPAL CORPORATIONS, 25, 26.**

OFFICERS.

See **CORPORATIONS, 23-27; DIRECTORS AND OFFICERS.**

ORDINANCES.

See **MUNICIPAL CORPORATIONS.**

PARTIES.

See **INSURANCE, 53, 54.**

PLEADING AND PRACTICE.

See **CORPORATIONS, 14; FOREIGN CORPORATIONS, 2; INSURANCE, 53-57; RAILROADS, 11-13.**

1. In an action upon a subscription for stock, it is too late, after verdict and judgment, to object that the complaint does not allege that the contract of subscription was in writing. 240.

2. Where in the trial of an action to enforce a liability for negligence the real facts are in substantial dispute, the case cannot be taken from the jury. 338.

3. Where the jury view the premises the verdict cannot be set aside as contrary to the evidence, since what the jury learned by the view is not preserved in the record, and all the evidence is not before the court. 496.

PREFERRING CREDITORS.

See **CORPORATIONS, 16-22.**

PROOF OF LOSS.

See **INSURANCE, 45-52, 95, 96.**

PUBLIC POLICY.

The public policy of a state is to be ascertained by reference to its Constitution, laws and judicial decisions 155.

QUO WARRANTO.

See CARRIERS, 69.

RAILROAD COMPANIES.

- I. LEGISLATIVE CONTROL.
- II. FIRES.
- III. PERSONAL INJURY CASES.
- IV. MISCELLANEOUS.

See CARRIERS; EMINENT DOMAIN;
RAILROADS IN STREETS; RECEIVERS;
STREET RAILROADS.

I. LEGISLATIVE CONTROL.

Compelling removal of grade crossings.

1. An act authorizing the railroad commissioners to order any railroad company, if in their opinion its financial condition will warrant, to remove a dangerous grade crossing, which it has failed to remove as required by the act, is within the police power of the state. 593.

2. Railroad company may be compelled to bear entire expense of change. 593.

3. Imposing such expense on the company does not amount to a taking of property without due process of law. 593.

4. There is no impairment of the obligation of contracts by reason of the large expenditure required, and the effect thereof on the contracts of the company with holders of its securities, where its charter is subject to amendment by legislative power. 593.

Regulating payment of wages.

5. Under the reserved power to alter and repeal all laws relating to the formation and organization of corporations, the legislature has the right to require railroad companies to pay for the labor of their employees when the same is fully performed. 185.

6. Such an act is not special legislation, since it is general and uniform in its operation on all persons coming within the class to which it applies. 185.

Interchangeable mileage tickets.

7. A statute requiring a railroad company to sell 1,000 mile passenger tickets for twenty dollars, to redeem such tickets on presentation by any other company, and to accept for fare over its own lines all such tickets issued

by any railroad company operating within the state, is unconstitutional, as authorizing one railroad to determine the conditions on which another railroad must carry passengers, and as compelling one railroad to carry passengers on the credit of another, thus appropriating individual property to the public use without the owner's consent. 569.

8. Such a statute is not invalid on the ground merely that certain railroads may be excepted from its operation by the order of the railroad commissioners. 569.

Regulating charges — railroad commissioners — injunction.

9. It is within the scope of judicial power to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of the property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. 641.

10. Railroad commissioners may be enjoined from enforcing unreasonable rates, but not from establishing reasonable rates and regulations. 641.

11. A suit against railroad commissioners of a state, to restrain enforcement of their regulations, as unjust and unreasonable, is not a suit against a state. 641, 674 note.

12. That a state statute, under which railroad commissioners assume to act, is constitutional, does not oust a federal court of jurisdiction to restrain their excessive and illegal acts. 641.

13. Under act of Texas allowing suits against the railroad commissioners appointed by the act, to be brought "in a court of competent jurisdiction in" a specified county, such a suit may be brought by a citizen of another state in the United States Circuit Court held in that county. 641.

II. FIRES.

14. A contract exempting a railroad company from liability for negligently setting fire to an elevator and coal sheds which it has permitted the plaintiff to place upon its right of way for use in his business and in connection with shipments of grain and coal made and received over its road, is not against public policy, but is valid and enforceable. 697.

15. Such a contract is not made by the company in its capacity as common carrier, and is not governed by the provisions of a statute that a common carrier cannot exempt itself from liability as such carrier by contract. 697.

16. A statute making a railroad company absolutely liable in damages for fires communicated by its locomotives, is not unconstitutional as impairing, by subjecting it to an increased burden, the rights given it by its previously granted charter to propel its cars by steam. 441.

17. Nor is the statute unconstitutional as denying to a railroad company the equal protection of the laws, nor as depriving it of its property without due process of law. 441.

18. In an action under such statute due care of the defendant is immaterial. 441.

19. It is no defense to an action against a railroad company under said statute for the destruction by fire of certain trees, that trees were not susceptible of insurance, as the statute makes all kinds of property the subject of insurance. 441.

20. The fact that plaintiff permitted weeds to remain on his land, adjoining the railroad, after they had become dried, does not show such contributory negligence as will defeat his right to recover for damages caused by fire set by one defendant's locomotives. 441.

21. Under a statute giving a railroad company an insurable interest in property along its right of way, no negligence, short of fraud, would bar plaintiff's right to recover. 441.

22. In an action for damages by fire set by one of defendant's locomotives, it is no defense that, in proceedings for the condemnation of defendant's right of way, plaintiff claimed, and was allowed, compensation for the danger to which his property would be liable from fire "for all time to come." 441.

23. A railroad company is not entitled to the benefit of insurance received by plaintiff on property destroyed by fire, and for whose destruction the company is liable. 441; 471 note 2.

III. PERSONAL INJURY CASES.

Release of damages — validity — fraud — return of consideration.

24. Where plaintiff's release for claims for injuries to clothing and per-

son are found, as to the latter, to have been obtained by fraud, though he could not have sued separately for the two injuries, it is no objection to his recovery that he has not returned the money paid him in settlement for his clothes. 484.

25. Evidence held sufficient to justify a jury in disregarding a release on the ground of fraud in procuring the same. 484.

26. What amounts to fraud in procuring release. 493 note 1.

27. Release to railroad company in consideration of payment by railroad relief association — impeachment for fraud. 494 note 2.

28. General words of release limited to injuries specified. 494 note 3.

29. One may sue for personal injuries without tendering a return of money received for a release of his claim, which he contends was obtained by fraud, and while he was mentally incapacitated, it being sufficient that the court instructs that, if the jury find for plaintiff, they deduct from the amount awarded the sum already received. 494 note 4.

Removing trespasser — authority of brakeman.

30. A brakeman has an implied authority to remove from his train, in a lawful manner, a trespasser found on a car platform. 343.

31. Authority of brakeman to eject trespasser. 348 note 1.

32. Liability for act of brakeman in ejecting trespasser. 348 note.

33. Where a brakeman, in removing a trespasser, kicks him from the train while in rapid motion, the railroad company is liable for injuries caused thereby, the act being within the scope of the brakeman's employment. 343.

34. Causing trespasser to jump from moving train by threats — liability of company. 350 note 2.

35. Removing a trespasser from a train of cars while the train is in motion, when the train is moving very slowly, is not negligence or wantonness per se. 350 note 3.

Negligence in giving statutory signals — frightening horses, etc.

36. Liability for damages resulting from the frightening of horses by blowing whistle, emitting steam, etc. 482 note.

37. A railroad company is bound to use ordinary care and prudence in giving statutory signals whenever at any given point such signals are allowed or required to be given; and negligence in the exercise of its right and duty in this respect is actionable negligence. 472.

38. The court will take judicial cognizance that the blowing of a whistle is one of the signals used in operating a railroad train, and that it is authorized and required in approaching stations and crossings, and in passing them; yet, if it be done negligently, wantonly or maliciously, such negligence, wantonness or maliousness is actionable if injury results therefrom. 472.

Coupling cars — negligence and contributory negligence.

39. Under an averment of the existence of a hole or rut in the track, between the ties, into which plaintiff stepped while making a coupling, it is sufficient to show that the spaces between the ties in the vicinity of the accident were not sufficiently filled by ballast, without proving the existence of any particular hole. 431.

40. A railroad company is not guilty of negligence in ballasting a side track so that, while the ties were covered in the middle of the track, at the sides the dirt was two to four inches below the rails, thus leaving holes between the ties. 431.

41. A railroad company owes no duty to a brakeman in its employ to ballast storage or switch tracks so as to prevent his foot being caught between the ties while endeavoring to couple cars. 440 note 1.

42. A switchman, injured by catching his foot in a space between the planking covering the railroad yards, is not entitled to recover damages therefor where he had been working in that yard for six weeks, during all of which time the planking had remained in the same condition. 440 note 2.

43. The fact that a switchman, injured while coupling cars, by reason of a hole in the track, might have selected another place to make the coupling, will not defeat his recovery for the injury, unless he knew, or ought to have known, of the danger incurred. 440 note 2.

44. A brakeman who is familiar with a side track cannot recover for

injuries received while attempting to uncouple moving cars on such track resulting from a hole in the roadbed which he could have readily seen if he had looked at the track before going on it. 431.

Injury from unauthorized acts of servant — scope of employment.

45. Where defendant's baggageman, without the knowledge of its officers, was in the habit of gratuitously carrying drills for a lime company, and throwing them out of the baggage car near the lime quarry, it is not liable for an injury to plaintiff, who was struck by the drills as they were thrown from the car by the baggageman. 555.

46. Effect of conductor's knowledge of baggageman's practice in carrying such freight. 555.

47. Effect of station agent causing such freight to be placed in baggage car. 555.

48. Liability for acts of servant — acts not within scope of employment. 564 note.

Negligence of mail agent.

49. Injury to person on platform by mail bag thrown from car — liability of company. 350, 353 note.

IV. MISCELLANEOUS.

Injury to adjacent property by blasting.

50. The powers granted to railroad corporations are construed as privileges conferred upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in the execution of such powers were done by an individual. 92.

51. A railroad company which, having to do blasting on its own land in order to lay its tracks, exercises due care in doing it, and uses charges of no greater force than are necessary for the purpose, is not liable for injury to adjoining property arising merely from the incidental jarring. 92.

52. If the damage in such case results from the failure of the railroad company to use due care, it will be liable. 92.

53. Liability for injuries to adjoining property by blasting. 103 note.

Duty to operate road — strikers.

54. The roadbed and superstructure of a railroad is charged with the burden of the company's charter obligations, and cannot be diverted from the purpose to which it was devoted, nor relieved from this burden, without the consent of the state, duly expressed by the legislature or other competent authority. 568 note.

55. The state Supreme Court has no jurisdiction to compel an interstate railroad company to operate its road within the state, in the face of a general strike, on the allegation that enough competent men are willing to work "for reasonable compensation." 566.

RAILROAD COMMISSIONERS.

See CARRIERS, 9-14.

RAILROADS IN STREETS.

1. The use of a street for a steam railroad is not a legitimate use for public purposes, and, if abutting property is injured thereby, the owner is entitled to damages, whether the fee is in him or the public. 103.

2. An electric street railway is not an additional servitude. 114 note 3.

3. Where a railroad is laid down in a public street, the abutting property is damaged, within the meaning of the Constitution of West Virginia, to the extent of the depreciation caused by the construction and operation of the road. 113 note 1.

4. Where a railroad company, for the purpose of approaches to an overhead street crossing, constructs embankments in the street that extend in front of plaintiff's lots, he is entitled to recover damages sustained thereby. 113 note 1.

5. A right to construct a railroad in a street is not a right to destroy the same as a highway by converting it into a switchyard and station ground, and for such use the abutter may recover damages. 114 note 4.

6. Where a railroad is laid in a public street without condemning the abutting owner's rights, the latter may maintain a common-law action for damages to be assessed up to the time of the trial, or he may sue for the permanent damage inflicted upon his property by reason of the location and construction of the road, and in such

case a recovery will confer upon the company an easement to occupy the street. 103.

7. Where a city ordinance, authorizing a railroad company to construct its road upon the streets, provides that it shall pay to any person or property owner "all" damages they may sustain, the damages recoverable by a property owner are only those fixed by the established rules of law, and do not include remote and speculative damages. 113 note 1.

8. Consent of abutter to construction of elevated railroad in street estops him and his grantees from claiming damages caused thereby. 116 note 6.

9. In estimating benefits resulting from the construction and maintenance of an elevated railway, not only those peculiar to the premises, but also those shared with neighboring property, should be considered. 116 note 7.

10. Measure and elements of damages. 116 note 7.

RATIFICATION.

Ratification of an unauthorized act will make the principal liable for an injury resulting from the negligence of the agent in doing the act. 79.

REAL ESTATE.

See FOREIGN CORPORATIONS, 6.

RECEIVERS.

1. The general freight agent, who held such position before receivers of the company were appointed, will be presumed to have the power to bind the receivers by a contract for the transportation of freight, in the absence of a showing to the contrary. 631.

2. Receivers of a railroad company have power to contract to carry freight at a specified rate from points beyond the terminus of their road to a point on such road. 631.

3. An order of court is not necessary to authorize receivers of a railroad company to make contracts with reference to freight rates. 631.

4. A receiver of a railroad company is not bound by a contract made by his predecessors for a rebate of freight charges, unless he ratifies it. 631.

5. The mere fact that a portion of the rebates accruing before he entered on the discharge of his duties was paid after such time does not constitute a ratification of such contract. 631.

RELEASE.

See RAILROADS, 24-29.

STOCK AND STOCKHOLDERS.

Right of minority to relief against acts of majority.

1. Equity will not interfere with the action of either the stockholders or directors of a corporation, in relation to its internal management, at the instance of a minority stockholder, where the acts complained of are neither fraudulent, illegal nor ultra vires. 124.

2. The facts that the acts complained of relate to the dealings of such corporation with another corporation, and that the same persons are the officers and majority stockholders of both corporations, while plaintiff has no interest in the latter corporation, do not give the court jurisdiction. 124.

Withdrawal of subscription to stock.

3. A subscriber to the stock of a proposed corporation may withdraw his subscription before the incorporation is completed, by giving due notice of such withdrawal. 246.

4. The fact that the associates have incurred obligations on the strength of the subscription does not affect the right of withdrawal. 246.

5. After articles of incorporation were executed and officers elected, but before the incorporation was complete, defendants orally informed the president that if a certain change in the policy was made they would no longer be associates, and would not pay their subscriptions, which change occurred. Held, that the evidence was sufficient to show due notice and an effectual withdrawal of the subscription. 246.

Preliminary subscriptions.

6. Preliminary agreements to subscribe for stock — when enforceable by corporation. 245 note 3.

7. A subscription for shares in a corporation thereafter to be formed under a general law may be accepted

by the board of directors of the company after organization. 245 note 3.

Defenses to subscriptions — fraud — estoppel.

8. One who was induced to, subscribe for stock in a corporation formed to purchase and develop certain land, by statements made by one of its promoters, on whose supposed disinterested and superior judgment he relied, in ignorance that such promoter had an option on the land, is not liable on his subscription. 285.

9. Laches does not begin to run as against a subscriber's right to repudiate a subscription obtained from him by fraud till he has knowledge of the fraud, or of facts which would reasonably arouse inquiry on his part. 285.

10. The subscriber is not affected with knowledge of the fraud by the disclosure of the facts in regard thereto at a stockholders' meeting for which the perpetrator of the fraud holds proxies from him, and at which he is not present. 285.

11. Persons who have been induced by the same fraudulent representations, contained in a prospectus, to subscribe to the stock of a corporation, may join in a bill, for the benefit of themselves and others similarly deceived, to set aside their subscriptions. 239 note 1.

12. Representations as to future acts and results not fraudulent. 289 note 2.

13. It is no defense to an action on a subscription for stock that the corporation has not delivered or tendered the certificate of stock. 245 note 2.

14. One who subscribes to corporate stock for his wife, in the wife's name, is not liable on the subscription, but if the subscription is for himself, although in the wife's name, it is otherwise. 245 note 2.

15. What deviation in the line of a proposed railroad will discharge subscribers to the stock of the company. 245 note 2.

16. An agreement, made between promoters of a corporation and a subscriber to its stock, that such subscriber is to have the stock for the sake of the influence of his name, is void, and the corporation may enforce payment of such subscription. 240.

17. One to whom stock in a corporation is issued, who pays assessments

on such stock, acts as an officer of the corporation, and takes part in its management, is estopped to deny his subscription. 240.

18. Stockholders who subscribe for stock, or assist in organizing a corporation under a charter, and thereby induce persons to credit the corporation, and do business with it on the faith of its being legally organized, will be estopped from alleging that the law under which the corporation is organized is unconstitutional. 63.

19. At common law a subscriber to the stock of a corporation is not liable on his subscription till the full capital stock is subscribed. 245 note 1.

20. Though the stock is all apparently subscribed, yet if one of the subscriptions is invalid, the other subscribers are not liable. 245 note 1.

STREETS AND HIGHWAYS.

Vacating streets — damages.

1. An owner of property on the corner of two streets cannot recover for depreciation caused by vacating one of the streets for several blocks directly beyond his property, though a statute requires the payment of any and all damages that may accrue in consequence of such vacation. 173.

2. A distinction may well be held to exist between the injury which results to an abutting owner, so situated that the means of ingress and egress to and from his premises are cut off by a discontinuance of a street, and one owning land upon another street, or on the same street at a distance from the part of the highway discontinued. 173.

3. A city which has discontinued part of a street is not liable in damage therefor to an owner of land which is diminished in value thereby, where the access from the land to the system of public streets remains substantially unimpaired. 184 note.

4. Right to recover damages caused to property by the vacation of a street. 183 note.

STREET RAILROADS.

See ELECTRICITY, 4-6; RAILROADS IN STREET.

1. A street railway company cannot be compelled by the city to tear up its

track laid in the center of a street pursuant to an ordinance duly accepted, to permit the laying of a sewer under it, where it appears that the sewer can just as well be laid on one side of the track. 326.

2. Injunction will lie, at the instance of a street railway, to prevent a city and the city officers from unreasonably requiring it to tear up its tracks, the remedy at law not being adequate. 326.

3. Rights as respects disturbance in consequence of street improvements. 330 note.

4. A passenger riding on a street car on a gratuitous pass cannot recover for personal injuries occasioned by the negligence of the company's servants, where the pass contains a condition exempting the company from such liability. 715.

5. Street cars propelled by electricity and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety. 333.

6. Relative rights and duties of the company and others in the use of the street and crossings. 341 note.

7. A street car has no superior right of way as against a vehicle going along a street which crosses the street car track. 341 note 1.

8. At a street crossing as high a degree of care is required of those in charge of an electric street car as those driving other vehicles. 341 note 1.

9. One about to cross a street railway track is bound, on reaching the track, to look in both directions for an approaching car, and failure so to do is negligence per se. 341 note 1.

10. Collision with vehicles — duties and liabilities of company. 342 note.

11. Duty of one crossing street upon which an electric railway is operated — contributory negligence. 333, 342 note 5.

12. Where one, after dark, obstructs an electric street car track with his team while unloading his wagon, he is guilty of such negligence as will bar an action for the injuries to the team from a car. 342 note 4.

13. Where a motorman, while sounding the gong, sees that the car and noise are frightening a horse, and thereby endangering the driver, it is his

duty to do what he reasonably can to diminish the fright of the horse. 331.

14. In such case the failure of the motorman to see the frightened condition of the horse, when he may see it by the exercise of reasonable care, is negligence. 331.

15. Duty of motorneer in case of frightened horses—liability of company. 333 note.

16. It is not negligence per se for a passenger to stand on the front platform of the trailing car of a cable train, where it is customary for passengers to do so, and there is no rule of the company against it. 715.

SUBROGATION.

See INSURANCE, 65.

SUBSCRIPTIONS.

See STOCK AND STOCKHOLDERS.

TAXATION.

See BANKS AND BANKING, 49-51; FOREIGN CORPORATIONS, 11.

Taxation of national bank shares. 232 note 10.

TELEGRAPH COMPANIES.

1. While telegraph companies are instruments of commerce and exercise a public employment and are bound to serve all customers alike, without discrimination and upon reasonable terms, yet they are not common carriers and are not subject to the same liabilities. 722.

2. Where a telegram is sent to plaintiff in care of "Mr. B.," and there is no person by the name of "B." in the place, and defendant makes no effort to find plaintiff, defendant is liable in damages. 515 note 4.

3. When a company has accepted a message for transmission it is its duty to send by a competing line, if its own line is disabled. 516 note 4.

4. Defendant, having received and transmitted a message, cannot excuse its delay in delivering it by setting up that the message was not in writing, and that it was not bound to receive it in the first instance. 516 note 7.

5. Where a telegraph company accepts a message for a point on a con-

necting line and collects pay for the entire service, it will be liable for negligence of the connecting line in the delivery of the message. 516 note 5.

6. Statutes imposing penalties upon telegraph companies for neglect of duty and defining their duties, construed and applied. 519 note 12.

7. A contract to send a message notifying the sendee of the death of his father is valid though made on Sunday. 519 note 10.

8. So of a message to a doctor, requesting his attendance upon a sick person. 579 note 11.

9. The person to whom a telegram is sent can maintain an action for whatever legal damage results to him from the negligence of the company in its transmission or delivery, where the message shows that he is interested in it, or that it is for his benefit, or that damage will result to him from such negligence. 755; 515 note 2.

10. Right of person interested in message to sue, though neither sender nor sendee. 515 note 3.

Limiting liability — unrepeatd messages.

11. Stipulations on the back of a telegraph blank form part of the contract when the face of the blank directs the sender's notice to such stipulations by words in clear type, and provides that the message is sent subject thereto. 722.

12. A regulation of a telegraph company requiring the sender of a message to have it repeated, at an additional charge of one-half the regular rate, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering the message, whether happening by negligence of its servants or otherwise, is reasonable and valid. 722.

13. Right to limit liability for negligence — unrepeatd messages. 748.

14. A provision in a telegraph blank that all claims for damages for negligence in sending the dispatch shall be made in writing within a certain time, or the company shall not be liable, does not apply to an action for a statutory penalty for such negligence. 519 note 12.

Cipher dispatches — damages.

15. Stipulations that a telegraph company will not be liable in any case

for errors in cipher or obscure messages, and that no employee of the company is authorized to vary this restriction, are not unreasonable or against public policy. 722.

16. A telegraph company is not liable to the sender of a message for losses on purchases of wool caused by a mistake in transmitting it, where it was in cipher and unexplained, although its agent knew that the sender was a wool merchant, and that the person addressed was in his employ. 722.

17. For its breach of a contract to transmit or deliver an unexplained cipher or otherwise unintelligible message, a telegraph company is liable only for nominal damages, or at most for the sum paid it for the transmission and delivery thereof. 506.

Damages — mental anguish — contributory negligence.

18. Where the failure of a telegraph company to promptly send or deliver a telegram according to its contract results in no other damage than mental pain and suffering, the only recovery that can be had is nominal damages, or at most the price paid for the transmission of the message. 755.

19. A message instructing the levying of an attachment was delayed, in consequence of which the sender lost

his debt which he might have secured. Held, that the company was liable for the amount of the debt. 517 note 10.

20. Mental anguish as an element of damages. 770 note.

21. Measure of damages in particular cases. 577 note 10.

22. Duty of plaintiff to exercise care and diligence to avoid loss. 517 note 9.

23. Effect of contributory negligence of plaintiff — what amounts to such negligence. 516 note 8.

TELEPHONE COMPANIES.

See ELECTRICITY.

ULTRA VIRES.

See CORPORATIONS, 28, 29.

USURY.

See BUILDING AND LOAN ASSOCIATIONS.

VACATING STREETS.

See STREETS AND HIGHWAYS.

WAIVER.

See INSURANCE, 66-70.

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